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No. 04-

IN THE

Supreme Court of the United States

CHRIST UNIVERSAL MISSION CHURCH,
Petitioner,

v.

CITY OF CHICAGO,
Respondent,

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2(a) of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), provides in relevant part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc.

The question presented is:

Whether government action must make religious uses or practices "effectively impracticable," or merely significantly more difficult, to constitute a "substantial burden" on religion for purposes of RLUIPA.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption.

Pursuant to Supreme Court Rule 29.6, petitioner states that it is not a nongovernmental corporation from which a corporate disclosure statement is required.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christ Universal Mission Church respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was issued on March 24, 2004, and is reported at 362 F.3d 423. The order of the court of appeals was amended on denial of rehearing on July 1, 2004, is unpublished, and is reprinted in the appendix to this petition ("Pet. App.") at 34a-35a. The complete opinion of the court of appeals reflecting the July 1, 2004 amendments is reprinted at Pet. App. 1a-13a. The opinion of the United States District Court for the Northern District of Illinois was entered on September 13, 2002, is unpublished, and available at 2002 U.S. Dist. LEXIS 22917, and is reprinted in the Pet. App. at 16a-33a. The district court's amended order was entered on December 17, 2002, is unpublished, and is reprinted in the Pet. App. at 14a-15a.

JURISDICTION

The opinion of the court of appeals, as amended on denial of rehearing, was issued on July 1, 2004. On September 20, 2004, Justice John Paul Stevens granted petitioner's application to extend the time to file a petition for a writ of certiorari from September 29, 2004, to October 29, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE

This petition involves Section 2 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, which provides in relevant part:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

. . .

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

STATEMENT OF THE CASE

This case offers the Court an opportunity to resolve an important conflict in the law governing religious freedom. It also offers an opportunity to resolve this conflict in the land-use context where, as Congress recognized in enacting the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), religious communities have often experienced discrimination and other burdens on religious exercise at the hands of land-use bodies in many localities throughout the nation.

The issue is whether, to create a "substantial burden" on religion, a government action must make religious exercise virtually impossible, or whether it is enough that the government action simply puts substantial pressure on religious adherents to forgo that conduct, thereby creating what this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), called "a *tendency* to inhibit constitutionally protected activity." *Id.* at 404 & n.6 (emphasis added). This issue arises with great frequency, not only, as here, in the application of RLUIPA, but also in cases applying the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and in certain types of cases arising under the Free Exercise Clause of the First Amendment.

It is also an issue on which the lower courts, including several federal circuits, are deeply divided. In the RLUIPA context alone, the Seventh Circuit, following the lead of the Second Circuit, now requires a religious plaintiff to demonstrate that the challenged government action makes religious exercise "effectively impracticable." In sharp contrast, the Tenth and Fifth Circuits, joined very recently by the Eleventh Circuit, have rejected this restrictive reading of the "substantial burden" requirement, and have opted instead for approaches similar to the "tendency to inhibit" standard embraced by this Court in *Sherbert*. Resolution of this conflict is important, not only to religious bodies throughout the Nation, but also to the many governments, at all levels, that are subject to the requirements of RLUIPA, RFRA and the First Amendment.

A. Zoning Schemes And Religious Communities.

An understanding of the issues in this petition requires a review of zoning schemes generally and their unique intersection with religious communities. For most of the history of land-use regulation, zoning authorities and churches have followed the paradigm of the neighborhood church, in which houses of worship were tucked away in residential zones, close to their members' homes and away

from business, commercial or manufacturing zones. That vision, however, no longer comports with the reality of many American religious communities, particularly small religious groups in large urban areas. New churches are constantly being formed, often by small groups of devout individuals, many of whom are racial minorities or recent immigrants. Moreover, as Judge Posner recently observed, this "'is not happening in just a Christian context. Within the New Age movement, Muslim, Hindu, and even Jewish traditions, small groups are gathering in storefront meeting houses.'" *CLUB* v. *Chicago*, 342 F.3d 752, 771 (7th Cir. 2003) (Posner, J., dissenting), *cert. denied* 124 S. Ct. 2816 (2004). Often, these individuals do not live in the same neighborhoods and are instead bound together only by their shared religious faith.

As these "new, small, or impecunious" religious communities, *id.* at 770 (Posner, J., dissenting), grow and seek more permanent space, that space is seldom available in residential areas that match the stereotype of where a "proper" church should be. New religious communities often find that there are no available properties in the favored residential zones, or that the only available properties are too small and too far from more visible and more accessible areas that would aid church growth. Accordingly, congregations look instead to commercial or business zones for quarters that can both satisfy their requirements for affordable meeting space and situate them in visible and accessible locations. Indeed, as Judge Posner observed, these religious communities may "trad[e] off the cost to the church of noisy and profane surroundings against the benefits in lower costs of land acquisition and proximity to sinners, including prostitutes, drug addicts, and gang members whose souls are particularly in need of saving." *Id.* at 772.

As demonstrated in a vast record compiled during Congress's consideration of RLUIPA, these so-called "storefront churches" face enormous challenges from local zoning authorities. See, *e.g.*, 146 Cong. Rec. E1564-67 (daily

ed. Sept. 21, 2000) (statement of Rep. Hyde) ("Hyde Statement"). Frequently, religious communities are flatly forbidden to locate in these commercialareas. Or they might be permitted but, as in this case, only with a special use permit or zoning map amendment from the local zoning authority.

The process for obtaining the requisite permits, moreover, is often subject to the political whim of the majority group. And it frequently entails bureaucratic red tape and prohibitive expense for small congregations, which may also face religious, racial, ethnic, socioeconomic and local prejudices. See *CLUB*, 342 F.3d at 770-72 (Posner, J., dissenting).

B. Factual Background Of This Case.

The Chicago Zoning Ordinance ("CZO") presents these all-too-typical challenges for urban religious communities. In Chicago, the City allows churches to locate as of right only in residential ("R") zones. Pet. App. 17a (Finding of Fact ¶ 4). In business ("B") and commercial ("C") zones, churches are deemed "special uses" that require approval from the City's Zoning Board of Appeals ("ZBA"). *Id.* In zones where churches are not an authorized special use—including manufacturing ("M") zones—churches are effectively precluded, though it remains possible in theory to petition the City Council for a map amendment to rezone the parcel. *Id.* at 17a, 23a (Findings of Fact ¶¶ 4, 33).

For a time, moreover, the CZO treated similar religious and nonreligious assembly uses differently in zone M. For example, it permitted community centers as of right in zone M, even though churches were prohibited. In February 2000, however, the City voted to amend the CZO to treat these uses uniformly in zone M (by deleting "'community centers'" from the list of permitted uses therein). Ordinarily, that change would have become effective on March 14, 2000 through publication in the City's Journal of Proceedings. However, the amendment was not actually published until

February 6, 2002.[1] The resulting confusion as to the amendment's effective date came to play a significant role in this case, although it is not directly pertinent to the issue presented here.

1. Christ Universal Mission Church is an independent religious congregation of about 60 members, most of whom are African-American, led by Pastor Roosevelt Simpkins. See Pet. App. 16a (Finding of Fact ¶ 1); Sept. 24, 2001 Tr. at 19:8-12, 20:11-24. It needs meeting facilities for a variety of ministries that are essential to the religious beliefs and exercises of the Church and of its members. See, *e.g.*, Sept. 24, 2001 Tr. at 22:19-23 & Exh. 5.

The Church's very ability to conduct these religious exercises, as well as their cost and quality, is greatly affected by the location and other qualities of its building. Location has a significant impact on the number of people who may be accommodated; the availability of parking; the accessibility of public transportation; the costs of acquiring space or renting it as well as repair and maintenance of any church-owned or operated property; the safety of members and visitors; and the appearance of the church's property. *Id.* at 50:6-57:22. Affordability, accessibility, adaptability, neighborhood diversity, and visibility are factors that make a property suitable—or not—for church use. *Id.* at 29:17-21; *id.* at 223:3-11.

In the latter months of 1998, the Church's leaders wished to find a larger facility to accommodate their growing congregation. They also sought greater visibility, accessi-

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[1] It is undisputed that the City Clerk failed to publish this change and that there were various "misprints contained in the Journal of Proceedings, zoning book, and Department of Zoning Web page" all failing to show the removal of community center as a zone M permitted use. Pet. App. 10a; *id.* at 26a (Finding of Fact ¶ 47). Also, at some point, the City Counsel "again" voted to put churches and community centers on equal footing in B, C, and M zones. *Id.* (Finding of Fact ¶ 48).

bility to transportation and adequate parking, as well as access to a more diverse community. Pet. App 17a (Finding of Fact ¶ 5). In furtherance of these objectives, and also to promote the goal of "racial and spiritual diversity" in their congregation, the Church targeted an area to which it had a prior connection, amounting to approximately 600 city blocks. See *id.*

In so doing, the Church was confronted with formidable obstacles arising from the CZO. First, existing church buildings seldom come on the market in Chicago. Indeed, "[w]ithin the Church's target area, no existing church buildings came on the market during the church's 2-year search." Pet. App. 23a (Finding of Fact ¶ 34). Moreover, to build in an R zone, a small church of 60 or more persons must obtain at least three contiguous single-family houses (three lots) for an adequate facility that satisfies parking requirements. Assembling three lots, tearing down the houses, and building a church is cost-prohibitive for many small churches. In any event, like many small congregations, Church leaders did not believe they had sufficient financial resources to acquire property and construct a new building in a residential area. *Id.* at 17a-18a (Finding of Fact ¶ 6).

For all these reasons, there are many more properties suited to churches in the B, C, and M zones of Chicago than in its R zones. But the Church could locate in a B or C zone only if it obtained a "special use permit" from the Zoning Board of Appeals ("ZBA"), and it was flatly prohibited from locating in the M zone (absent a map amendment). See CZO art. 8.1 *et seq.*, art. 9.1 *et seq.*

Before it would be allowed to apply for a special use permit, moreover, the Church would have to obtain a "turn down" letter from the Building Department, which requires a plat or survey of the property proposed for church use and an interior floor plan and site parking plan prepared by a licensed architect. See generally Sept. 24, 2001 Tr. at 159:6-160:20. Then the Church would have to (a) submit a written

application, (b) specify a particular property where it hopes to assemble for worship, (c) pay expenses of approximately $5,000, consisting of the application fee, title search for neighboring owners, certified mailings to notify neighbors, legal fees, and fees of the appraiser, realtor, architect, or other expert witnesses, (d) notify all property owners within 250 feet of the proposed church, and (e) present evidence at a public hearing of the ZBA that its church satisfies the requirements of the CZO. See *id*; see also *CLUB*, 342 F.3d at 771 (Posner, J., dissenting).

After accepting the application, the ZBA would then notify the alderman, who could support, take no action, or actively oppose the permit. See Sept. 24, 2001 Tr. at 159:6-163:12. The Planning Department also would be notified. *Id.* A public hearing would then be held, at which neighbors, the alderman, community groups, and the general public could express opposition to or support for the Church's application. *Id.* The ZBA requires any applicant to have a licensed appraiser testify that the proposed special use will not "substantially injure the value" of the neighboring properties. If the alderman requests a delay, the Board would give a one or two month postponement of the case. And, if the Planning Department did not prepare a report, the ZBA would be precluded from making a decision.

Moreover, if the Church bought property in a B or C zone, but could not obtain a special use permit, it would have to get it rezoned R through a map amendment or a planned development approval. And, if the Church bought property in an M zone, it would have to obtain rezoning to R or get planned development approval. There are, moreover, no standards for approval of a map amendment (rezoning); it is left to the complete discretion of the City Council.

2. In February 1999, the Church contracted to purchase 7017 West Grand Avenue, in Chicago, Illinois. The property consists of a one-story brick building containing two vacant stores spaces and a podiatrist office; it fronts on a busy

thoroughfare, across the street from a public transportation terminal. Pet. App. 18a-19a (Findings of Fact ¶¶ 9, 15). Because the property was then zoned B, it required a Special Use Permit for church use. *Id.* at 18a (Finding of Fact ¶ 6). After the Church was unable to obtain financing, the contract was not completed. *Id.* at 20a (Finding of Fact ¶ 17).

Meanwhile, in March 1999, the alderman in whose ward the property lies, alerted by a neighborhood group to the vacancy at 7017 West Grand, sought to rezone the 7000 block of West Grand from B to M—notwithstanding that "none of the properties" on that block were then "used in a manner traditionally associated with manufacturing," and even though "no manufacturing use is likely for that block for the foreseeable future." Pet. App. 20a (Finding of Fact ¶ 18). Indeed, the City Zoning Department "recommended against" it and respondent's key witness "would have recommended against the change." *Id.* Nonetheless, the proposal passed the City Council in April 1999. *Id.* at 21a (Finding of Fact ¶ 23).

When the Church again contracted to buy 7017 West Grand in January 2000, its pastor and realtor mistakenly believed it was still zoned B. Indeed, the Multiple Listing Service listing form indicated "the property would be ideal for church-use." Pet. App. 21a (Findings of Fact ¶¶ 24-25).

Acting on that belief, on June 5, 2000, the Church entered into an installment agreement to purchase the property. Sept. 24, 2001 Tr. at 61:5-22. A few days later, when Church leaders visited the alderman's office to ask for help in getting a special use permit, they were told that because 7017 West Grand was now zoned M, the special use process was not available. Pet. App. 22a (Finding of Fact ¶ 31). They also asked about the possibility of a map amendment, but the alderman never responded to their inquiry. Within a week, the pastor met with a liaison to the Chicago mayor who promised to arrange a meeting with the alderman but did not do so. *Id.* at 22a-23a (Finding of Fact ¶ 32).

Christ Universal Mission began making installment payments of $2,636.76 per month on the 7017 West Grand property and performed some renovations. Sept. 24, 2001 Tr. at 62:3-19. And, in January 2002, the Church began holding religious services at the property. Pet. App. 26a (Finding of Fact ¶ 49). After City officials objected to the Church's holding services at this location, the Church was forced to enter into a stipulation to discontinue these meetings pending the resolution of this case. *Id.*

3. The undisputed evidence demonstrates that the CZO and respondent's decisions thereunder imposed enormous burdens on the religious practice of petitioner and its members. Core elements of the Church's ministry have been stymied. Rather than being able to use its building at 7017 West Grand, the Church has been forced to cram its 60-person congregation into a residential basement. This has made essential religious and ministry functions such as weddings, baptisms, community outreach, worship, religious education, and counseling, extremely difficult. See, *e.g.*, Sept. 24, 2001 Tr. at 48:25-57:21; Pet. App. 26 (Finding of Fact ¶ 49). Moreover, given the $2,600/month mortgage on the 7017 West Grand property, the church cannot afford to rent other space. Sept. 24, 2001 Tr. at 73:22-74:6.

These conditions, moreover, preclude the Church from carrying out its chief mission of evangelism, which the Church believes is commanded by the Bible. See Mark 16:15, Acts 1:8. That is because there is simply no room for new members. Sept. 24, 2001 Tr. at 74:23-78:12.

C. Proceedings In The District Court.

Petitioner sued the City for impermissibly burdening its religious exercise in violation of RLUIPA's Section 2(a)(1) and the First Amendment; for the denial of its rights to procedural due process with respect to rezoning; for discriminating against religious land use in violation of

Section 2(b)(1) of RLUIPA and the federal Equal Protection Clause.

Petitioner moved for a preliminary injunction on the latter claim—challenging the pre-amendment CZO's exclusion of churches in zone M, where nonreligious assembly uses such as community centers were permitted. That motion was granted by the district court and subsequently made permanent. Pet. App. 14a-15a, 33a. In so doing, the district court determined that the zoning amendments were not effectively amended to remove this discrimination until February 2002, after the church purchased 7017 West Grand. The court thus enjoined the City from preventing petitioner's use of this property as a church. *Id.* at 32a-33a.

Because the district court ruled in petitioner's favor on the basis of its discrimination argument, the court did not reach petitioner's other claims, including its claim that the City's refusal to allow petitioner to use its property as a church violated Section 2(a)(1) of RLUIPA by substantially burdening petitioner's religious exercise (and that of its members) without adequate justification. See generally Pet. App. 32a-33a (denying "[a]ll other pending motions" as "moot").

D. The *CLUB* Decision.

Prior to the decision of the court of appeals in this case, the Seventh Circuit issued a decision in a similar case, *CLUB* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), involving the intersection of Chicago's zoning ordinance, RLUIPA, and the Constitution. In a 2-1 decision, over a dissent by Judge Posner, the panel affirmed the district court's entry of summary judgment in favor of the City on each of the claims made by the churches who were plaintiffs there.

On the substantial burden issue, the majority held that the City was entitled to summary judgment on plaintiffs' claims under Section 2(a) of RLUIPA and the Free Exercise Clause. In so doing, the majority found that plaintiffs could not

establish the substantial burden required by both provisions. The majority held that a "substantial burden" involved something greater than a mere pressure or tendency to coerce individuals to alter their religious beliefs. Instead, the Seventh Circuit imposed a stricter standard, holding that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—*effectively impracticable*." *Id.* at 761 (emphasis added).

Under this "effectively impracticable" test, the court of appeals found that the *CLUB* plaintiffs could not show the zoning ordinance violated either the Free Exercise Clause or the "substantial burden" provision of RLUIPA. Despite the difficulties associated with finding suitable properties for churches, the ordinance, according to the majority, did not "render impracticable the use of real property in Chicago for religious exercise." *Id.*

E. The Court Of Appeals' Decision In This Case.

In its initial briefs in this case, petitioner advanced two principal arguments. First, it defended on the merits the district court's view that as of February 2000, when petitioner purchased its building, the CZO allowed community centers but not churches to locate as of right in M districts, and that this distinction was irrational and thereby violated petitioner's equal-protection rights. Second, petitioner argued in the alternative that the district court's decision could be affirmed on the basis of Section 2(a)(1) of RLUIPA because the City's treatment of petitioner's building, regardless of the timing of the changes to the CZO, imposed substantial burdens on religion without sufficient justification. See Br. (May 6, 2003) at 20, 27-28.

CLUB was decided while this case was pending on appeal. Prior to oral argument, but after the initial briefing, the court

of appeals invited the parties to submit supplemental briefs explaining the impact of that decision on this case. In its supplemental brief, petitioner argued, among other things, that *CLUB* supported the district court's decision because it established the irrationality of permitting community centers but not churches in M districts. Supp. Br. at 1-2 (Sept. 8, 2003).

On March 26, 2004, however, the court of appeals issued its decision in this case, reversing the district court's judgment and vacating its injunction. In a lengthy analysis, which is assumed correct for purposes of this petition, the court of appeals concluded that the CZO amendments had in fact taken effect as of February 2000. Thus, the court concluded that at the time petitioner had sought permission to use its building, the CZO did not actually discriminate as between churches and community centers in zone M. Pet. App. 11a. Accordingly, the court concluded that the district court had been mistaken in finding in petitioner's favor on its equal protection claim. *Id.* at 13a.

Based on its recent decision in *CLUB*, the court of appeals also summarily rejected petitioner's alternative argument that the City's actions violated Section 2(a)(1) of RLUIPA by imposing a substantial burden on petitioner without adequate justification. Early in its decision, the court below referred to *CLUB* as having "upheld the CZO under RLUIPA," Pet. App. 2a, and as having found "the CZO constitutional and in compliance with RLUIPA as of the February 2000 amendments," *id.* at 3a. Then, in a footnote, the court held that *CLUB* "forecloses" petitioner's "constitution- and RLUIPA-based claims," including petitioner's substantial burden claim under Section 2(a)(1) of RLUIPA. *Id.* at 13a n.5. It is that claim, and only that claim, that is at issue in this petition.

REASONS FOR GRANTING THE PETITION

In the last decade, federal and State courts have decided hundreds of cases brought by synagogues, churches or mosques against municipal zoning laws and decisions. This case presents an important question that arises in many such cases and on which the courts of appeals (and at least one State supreme court) are hopelessly divided. This conflict, moreover, reflects a fundamental disagreement over the proper interpretation of this Court's decisions in this critically important area of the law And the issue on which this conflict arises has an enormous practical impact on churches and other faith-related institutions throughout the Nation.

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT OVER THE PROPER STANDARD FOR DETERMINING WHEN A LAW IMPOSES A "SUBSTANTIAL BURDEN" ON RELIGION.

The Seventh Circuit's interpretation of RLUIPA's "substantial burden" requirement, adopted in *CLUB* and applied in this case, widens an existing circuit conflict. It is a conflict between those courts of appeals which, like the Seventh Circuit, require religious practice to be made virtually impossible and those that merely require a substantial increase in the cost of religious observance. This Court's guidance is badly needed to resolve this core question of federal law, which arises frequently in the application not only of RLUIPA, but also in the application of RFRA and the Free Exercise Clause.

1. The majority in *CLUB* set a high threshold for finding that government action substantially burdens religion. Observing that RLUIPA has a "broad[] definition of religious exercise," in which the exercise at issue "need not be 'compelled by or central to' a particular religion," the Seventh Circuit properly concluded that a "substantial burden" could not be established by the "slightest obstacle to religious

exercise incidental to the regulation of land use" or it would render meaningless the word "'substantial.'" 342 F.3d at 761. From there, however, the court falsely assumed that the only alternative was the opposite extreme, and so it made an unwarranted logical leap. It concluded that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof . . . —*effectively impracticable*." *Id.* (emphasis added).

The Seventh Circuit's high threshold is similar to the extreme approach adopted by the Second Circuit. Reasoning that the "central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices," a panel of the Second Circuit concluded there could be no "substantial burden" absent "coercion in religious practices, or the Church's *inability* to carry out its religious mission in its existing facilities." *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (emphasis added). Accordingly, even though the landmarking law at issue there "*drastically* restricted [a] Church's ability to raise revenues to carry out its various charitable and ministerial programs" by building an office tower, no substantial burden was shown. *Id.* (emphasis added).[2]

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[2] In a similar case in which a zoning ordinance prohibited home worship, the Ninth Circuit held that even significant burdens of "convenience and expense" are insufficient for a free exercise violation. *Christian Gospel Church, Inc.* v. *City & County of S.F.*, 896 F.2d 1221, 1223-24 & n.2 (9th Cir. 1990). Recently, the Ninth Circuit reiterated its position on the meaning of "substantial burden" and expressly noted that its approach was "entirely consistent" with the Seventh Circuit's "effectively impracticable" standard, though it did not expressly adopt that standard. *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004).

In short, the Seventh Circuit has joined the Second Circuit in requiring that religious practice be made essentially *impossible* before government action will be viewed as imposing a substantial burden on religion.

2. In contrast to this stringent approach, several circuits (and at least one State supreme court) have taken a more moderate view. They have recognized that burdens fall along a continuum between those that make a religious practice virtually impossible and those that are merely trivial inconveniences, and that middle-ground obstacles constitute a "substantial burden" on religion for purposes of RLUIPA, just as more extreme burdens do.

Most significantly, and very recently, the Eleventh Circuit expressly "decline[d] to adopt the Seventh Circuit's definition" of "'substantial burden'" in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), *petition for certiorari filed*, No. 04-469 (U.S. Oct. 1, 2004). Instead, the Eleventh Circuit looked to the *Sherbert* line of cases, and held that a substantial burden merely "requires something more than an incidental effect on religious exercise," such as "pressure that tends to force adherents to forego religious precepts." *Id.*[3]

Other circuits have reached similar conclusions. For example, the Tenth Circuit, following this Court's analysis in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), concluded that a substantial burden is one that has a "'*tendency* to coerce individuals into acting contrary to their religious beliefs.'" *Thiry* v. *Carlson*, 78 F.3d

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[3] The Eleventh Circuit further observed that many earlier cases finding that zoning decisions did not impose a substantial burden on religious exercise turned on whether land use was integral to a believer's faith. 366 F.3d at 1225-26. But, it pointed out, "RLUIPA obviates the need for such analysis by providing a statutory definition of 'religious exercise,'" a definition that expressly "includes the 'use, building, or conversion of real property for the purpose of religious exercise . . . .' 42 U.S.C. § 2000cc-5(7)(B)." *Id.* at 1226.

1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng*, 485 U.S. at 450-51). Put another way, it is enough that the government regulations "significantly inhibit or constrain," "meaningfully curtail" or deny "reasonable opportunities" for religious practice. *Id.* (internal quotation omitted). Government action need not make religious exercise effectively impracticable. *Id.*

The Washington Supreme Court employed a similar analysis in *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992). Pointing to this Court's religious taxation cases, the Washington court recognized that "a *financial* burden on religious activity, if too gross, may unconstitutionally infringe on free exercise." *Id.* at 183 (citing *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 391 (1990)); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 23 (1989) (plurality opinion) (taxes may result in an unconstitutional imposition on religious activity where "the tax burden is far from negligible"). For example, where land-use regulation "grossly diminishes the value of the Church's principal asset" it "impermissibly burdens [the] right to free exercise of religion" even if it does not make religious observance impossible or impracticable. *First Covenant Church*, 840 P.2d at 184.

The Fifth Circuit reached the same conclusion in *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988). That case, like this one, involved a challenge by a minority religious sect to a city's denial of a special use exemption in a non-residential area. The Fifth Circuit concluded that zoning laws that make religious assemblies "relatively inaccessible within the city limits" and thereby ensure that "churches, synagogues, and mosques [become] accessible only to those affluent enough to travel by private automobile," create an "obvious[] burden [on] the exercise of religion by the poor." *Id.* at 299.

That approach would invalidate—or at least preclude summary judgment in favor of—the City's actions here.

Respondent's zoning scheme makes churches such as petitioner's "relatively inaccessible" and thus creates an "obvious" significant burden on petitioner and its congregation, even if the scheme does not make their religious practices "effectively impracticable."

In short, under these more moderate approaches, petitioner would not have had to show that its religious practice was made effectively impossible. It would have to show only that it was significantly inhibited or denied reasonable opportunities to have a house of worship.

3. Petitioner plainly made this showing below. While barred from using their property at 7017 West Grand, the Church's 60 congregants have been crammed into a residential basement, making essential religious and ministry functions extremely difficult, if not impossible. These conditions prevent the Church from carrying out its chief mission—the outreach to new members that the church believes is commanded by the Bible (see Mark 16:15, Acts 1:8)—because the basement simply cannot accommodate any new members. These conditions also severely limit the Church's ability to provide fundamental religious services such as baptisms and weddings. Moreover, given its existing $2,600/month payments on the 7017 West Grand property, the Church cannot afford to rent appropriate space. Petitioner also has expended significant time and money wading through the zoning process and related litigation.

While these impediments do not make all aspects of religious practice "effectively impracticable," as the Seventh Circuit requires, they do impose a burden that at the very least "*tends* to force adherents to forego religious precepts." *Midrash Sephardi*, 366 F.3d at 1227. Under the law prevailing in the Eleventh, Tenth, and Fifth Circuits, as well as in the Washington Supreme Court, that is enough to establish a "substantial burden" under RLUIPA. Accordingly, petitioner clearly would have prevailed on that issue if it

had been before one of those courts rather than the Seventh Circuit.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT IN PRINCIPLE BETWEEN THE SEVENTH CIRCUIT'S APPROACH AND THIS COURT'S "SUBSTANTIAL BURDEN" CASES.

The Seventh Circuit's approach also conflicts in principle with this Court's own "substantial burden" decisions. See Sup. Ct. R. 10(c). These include *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). This conflict is significant because the standard articulated in those decisions still applies to some free exercise claims after *Employment Division* v. *Smith*, 494 U.S. 872, 884 (1990).[4] It would be odd, to say the least, if the

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[4] For example, this case falls squarely within the "individual exemptions" category recognized in *Smith* and *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993). Under that doctrine, strict scrutiny applies to any law that "represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Id.* at 537 (quoting *Smith*, 494 U.S at 884). The Chicago zoning ordinance creates just such a system of individualized assessments of land-use matters involving religious uses, and is therefore subject to strict scrutiny if a substantial burden on religious exercise can be shown.

To be sure, as the Tenth Circuit recently observed, "courts and commentators are divided on the question" of when the individualized assessments doctrine applies. *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). The Seventh Circuit's conclusion in *CLUB* that this doctrine does *not* apply to government regulations such as the Chicago zoning ordinance expands this growing conflict. Indeed, *Axson-Flynn* itself conflicts with numerous decisions, such as a decision of the Washington Supreme Court holding that land-use ordinances that "contain mechanisms for individual exceptions" and "invite individualized assessments" are *not* "generally applicable" and require strict scrutiny review. *First Covenant Church*, 840 P.2d at 181. It also conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), which held that a system in which exemptions are given for secular reasons, but are not

phrase "substantial burden" were to be given one meaning under RLUIPA and a different meaning under the First Amendment. Even more important, the Seventh Circuit's divergence from *Sherbert* and *Thomas* is important because the "substantial burden" standard in both RFRA and RLUIPA was expressly based on those and similar decisions of this Court. See, *e.g.*, 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy) ("Joint Statement") (noting that the term "substantial burden" should be "interpreted by reference to Supreme Court jurisprudence"). As a matter of sound statutory interpretation the phrase "substantial burden" must be given the same meaning as it has in this Court's decisions.

1. A review of *Sherbert* is instructive because the government action there did not come close to making religious practice effectively impracticable, as the Seventh Circuit and several others would require. *Sherbert* involved a simple denial of unemployment benefits to a Sabbatarian who was fired for refusing to work on Saturday. 374 U.S. at 399-400. Yet this Court squarely rejected the argument that, because only the denial of a government "benefit or privilege" was at issue, there was no substantial burden on religion. Instead, this Court observed that even "conditions and qualifications upon governmental privileges and benefits" frequently "have been invalidated because of their *tendency to inhibit* constitutionally protected activity." *Id.* at 404 & n.6 (emphasis added). Elsewhere, this Court explained that the substantial burden requirement meant simply that the government regulation put "*pressure* upon [plaintiff] to forego [a religious] practice. *Id.* at 404 (emphasis added). This Court, then, clearly stopped short of requiring, as the Seventh Circuit does, that the regulation make religious observance "effectively impracticable." *CLUB*, 342 F.3d at 761.

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extended for religious reasons, "must survive heightened scrutiny." *Id.* at 366.

The same was true in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), another case involving the denial of unemployment benefits to an individual who balked at performing work duties that conflicted with his religious beliefs. There, this Court reiterated that the government action need not "*compel* a violation of conscience" to place a substantial burden on free exercise. *Id.* at 717 (emphasis added). All that is necessary is a "coercive impact," for example, in "condition[ing] receipt of an important benefit" on the restraint of religious practice, "thereby putting substantial *pressure* on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717-18 (emphasis added). This Court again insisted that, even though "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718. Here again, this is a far cry from requiring a plaintiff to show that the regulation makes his religious exercise "effectively impracticable."

2. There can be no doubt that the burdens the City imposed on petitioner are "substantial" within the meaning of these decisions. As Judge Posner recognized in *CLUB*, the burden on the "obscure sects" there, as on petitioner here, "was formidable." *CLUB*, 342 F.3d at 770, 773 (Posner, J., dissenting). Specifically, petitioner has had to give up key aspects of its ministry and religious practice, forgo evangelism opportunities, and expend significant time and money to navigate the zoning process. This is clearly the kind of "substantial burden" contemplated in decisions such as *Sherbert* and *Thomas* because it has a "*tendency to inhibit* constitutionally protected activity." 374 U.S. at 404 & n.6 (emphasis added).

In sum, the Seventh Circuit's "effectively impracticable" standard departs sharply both from this Court's traditional understanding of "substantial burden" and from the moderate approach taken by several circuit and at least one State court.

III. THE ISSUE PRESENTED HERE IS OF ENORMOUS PRACTICAL IMPORTANCE TO CHURCHES AND OTHER FAITH-BASED INSTITUTIONS NATIONWIDE.

A final reason to grant review here is that the proper interpretation of the statutory phrase "substantial burden" is of enormous practical importance to churches and other faith-based institutions, as well as to local governments. As Congress found less than four years ago in enacting RLUIPA, "'zoning conflicts between churches and cities have become a leading church-state issue. Disputes have arisen over church soup kitchens or homeless shelters in suburbs, expansion of church facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning permits.'" Hyde Statement at E1564. The proper interpretation of the "substantial burden" standard is very often at the heart of these disputes.

1. In most religious traditions, a place to gather, worship and perform religious ministries is indispensable to religious exercise. "The physical embodiment of a faith group—its church—represents its ability to speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 945 (2001). Indeed, as Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." Joint Statement at S7774. Accordingly, land-use constraints on religious meeting spaces often impose severe religious hardships. Even where those constraints do not make religious practice impossible—as the Seventh Circuit's standard would require—they often create substantial and cognizable hardships. For example, lack of adequate seating inevitably forces some adherents to stand in

foyers and hallways, precluding their direct participation in worship services. Evangelism becomes impossible when there is no room for new members. Religious teaching and counseling suffer when there is no space for quiet contemplation or instruction. Parents are deterred when there is no space to care for restless children.

Similarly, the design and arrangement of a religious space is "'freighted with religious meaning,'" with certain liturgies requiring particular building designs. *First Covenant Church*, 840 P.2d at 182; *Society of Jesus* v. *Boston Landmarks Comm'n*, 564 N.E.2d 571, 573 (Mass. 1990). Features such as the sanctuary, altar, steeple, counseling rooms, and classrooms may all be critical to religious practice and, in certain circumstances, substantially impacted by zoning regimes.

2. Impediments to religious exercise are not limited to those inherent in the physical structure and siting of churches. Indeed, religious communities are often deliberately burdened by "brash display[s] of religious discrimination." H.R. Rep. No. 106-219, at 22 (1999). Before passing RLUIPA, Congress assembled "massive evidence" that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." Joint Statement at S7774. As a result, RLUIPA was supported by "a substantial record of evidence indicating a widespread pattern of religious discrimination in land-use regulation"—discrimination that especially disfavors "upstart" congregations and religious communities. H.R. Rep. No. 106-219, at 18.

In one notorious case, zoning officials required a new Orthodox synagogue to include in its building plan a large number of parking spaces, even though members of the synagogue—like many observant Jews—walked to services. Once the synagogue agreed to construct the unneeded parking spaces, the city denied the permit anyway, citing traffic

problems associated with the number of cars for which the parking lot was designed. See *Orthodox Minhan* v. *Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772, 773 (Pa. Commw. Ct. 1989), *cited in* H.R. Rep. No. 106-219, at 23 & n.109.

Congressional testimony established that such discrimination was not isolated but was rather a nationwide problem. Joint Statement at S7775; H.R. Rep. 106-219, at 24 ("Conflicts between religious organizations and land use regulators are much more common than reported cases would indicate.").

The evidence amassed in legislative hearings also indicated that, because of zoning regulations in residential areas, oftentimes "[c]ommercial districts . . . are the only feasible avenue for the location of new churches." H.R. Rep. No. 106-219, at 18. For some churches, such nontraditional storefront locations are precisely the kind of venue required for their religious missions. Hyde Statement at E1565 (citing examples). Yet, as in this case, local governments often block churches from using such commercial properties, citing "such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" Joint Statement at S7774. *Accord* Hyde Statement at E1565-66.

In short, religious communities regularly suffer from severe constraints on their religious practice as a result of both deliberate and inadvertent burdens on their exercise of religion. Building on decisions of this Court such as *Sherbert* and *Thomas*, Congress designed RLUIPA's "substantial burden" standard to alleviate these hardships. It is imperative that this standard be interpreted consistently with those decisions so that religious institutions will have the protections they need to carry out their religious missions, as Congress plainly intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF
APPEALS SEVENTH CIRCUIT

No. 02-4119

CHRIST UNIVERSAL MISSION CHURCH,
Plaintiff-Appellee,

v.

CITY OF CHICAGO,
Defendant-Appellant.

Argued Oct. 23, 2003
Decided March 26, 2004
As Amended on Denial of Rehearing July 1, 2004

Before MANION, KANNE, and EVANS, *Circuit Judges*.

KANNE, *Circuit Judge*.

I. Background

The City of Chicago, through its city council, promulgates zoning ordinances governing where various entities may locate within the City. The portion of the Chicago Zoning Ordinance ("CZO") at issue in this case, 17 Municipal Code of Chicago Article 10.3-1 (2000), has already been the subject of litigation in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir.2003), *reh'g en banc denied*, 342 F.3d 752, 2003 WL 21977001 (Nov. 26, 2003) 2003 U.S.App. LEXIS 24176. In that case, Civil Liberties for Urban Believers ("CLUB") and five individual member churches argued that the CZO's treatment of places

of worship as compared to similar assembly uses was unconstitutional and violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. Notably, the City amended the CZO in February 2000 in response to CLUB's lawsuit. In doing so, it attempted to equalize the treatment of churches and other like organizations within its zoning scheme. For example, the City amended the CZO to require clubs, lodges, meeting halls, recreation buildings, and community centers to obtain special use approval to locate within any B (business) or C (commercial) districts. This placed those assembly uses on the same footing as churches, which prior to and following the amendments also had to obtain special use permits to locate in any B or C district. *CLUB*, 342 F.3d at 758 (describing the City's 2000 CZO amendments).

Even after the amendments, CLUB continued to press that the CZO failed to comply with RLUIPA by substantially burdening religious exercise and discriminating against churches. It also claimed that the CZO violated the First and Fourteenth Amendments to the United States Constitution by prohibiting the free exercise of religion and denying churches equal protection under the law, among other challenges. In *CLUB*, we upheld the CZO under RLUIPA, finding that the February 2000 amendments did not substantially burden religious exercise and "simply place churches on an equal footing with nonreligious assembly uses, thereby correcting any potential violation of [RLUIPA's] nondiscrimination provision." *Id.* at 762.

We also held that the CZO, as amended in February 2000, was constitutional. We discerned no violation of the Free Exercise Clause, and we determined that the zoning scheme satisfied the requirements of the Equal Protection Clause. As to the equal protection challenge, we found that any remaining differences in treatment between religious and nonreligious assembly uses after the February 2000 amend-

ments were "rationally related to Chicago's legitimate interest in regulating land use within its city limits." *Id.* at 767.

The *CLUB* court examined the CZO amendments in their entirety, as introduced through MA (mayoral application) 59 at the January 25, 2000 session of the city council's zoning committee. MA-59 was passed by the city council on February 16, 2000. It went into effect March 14, 2000, after the Mayor had an opportunity to review the ordinance as passed and after publication in the city council's Journal of Proceedings.

MA-59 contained nine sections amending language in several different CZO articles. The present matter deals only with the amendment to CZO Article 10.3-1, contained in § 7 of MA-59. It is before us because of an unfortunate wrinkle in the Chicago city council's efforts to enact MA-59. Specifically, the version of the amended CZO released to the public contained a misprint. Instead of correctly representing that Article 10.3-1, as amended, removed recreation buildings and community centers as permitted uses in M (manufacturing) districts (the "community-center deletion"), it continued to list them as allowed. The city council corrected the misprint, but not until two years later, in February 2002.

Although the parties in the *CLUB* case noted the misprint in footnotes in their appellate briefs, it was not an issue before the *CLUB* court. Thus, our decision in that case, although finding the CZO constitutional and in compliance with RLUIPA as of the February 2000 amendments, did not address the effect, if any, of the misprint on the enactment of the community-center deletion. We must do so here, as explained below.

II. Facts

Christ Universal Mission Church purchased property in an M district in June 2000. Churches, unlike recreation buildings and community centers, have never been permitted uses in M

districts, either before or after the February 2000 CZO amendments. Christ Universal challenged the CZO as unconstitutional and illegal under RLUIPA when it discovered that it could not operate in its chosen location without seeking a map amendment but that community centers could (according to the *published* version of the CZO).[1] Christ Universal sought a preliminary injunction to prevent the City from enforcing the CZO's prohibition on churches in M districts in this instance, which would allow Christ Universal to function as a church on its M-district property.

The district judge determined that the city council did not effectively amend Article 10.3-1 of the CZO barring recreation buildings and community centers from M districts until February 2002 when it issued a correction to its Journal of Proceedings. The district court then went on to grant Christ Universal's request for a preliminary injunction. It found no rational basis for the City to permit community centers in M districts yet exclude churches, resulting in a violation of the Equal Protection Clause of the Fourteenth Amendment and RLUIPA. It did note, however, that the February 2002 correction effectively amended the CZO to ban both churches and community centers from M districts and brought the CZO into compliance with the Equal Protection Clause. But, because the CZO was unconstitutional at the time Christ Universal purchased and starting using its M-district property as a church, the district court held that it could continue operating there as a nonconforming legal use. The district court subsequently made the preliminary injunction permanent, based on the record compiled in the preliminary injunction hearing and briefing. This appeal followed.

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[1] Christ Universal's arguments in many ways mirror those made by the appellants in *CLUB, supra,* which is not surprising, as they are represented by the same counsel.

III. Analysis

We review a district court's decision to grant a permanent injunction for abuse of discretion. *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir.2001) (*citing Knapp v. Northwestern Univ.*, 101 F.3d 473, 478 (7th Cir.1996)). Findings of fact are reviewed for clear error and legal conclusions de novo. *Id.* "A factual or legal error may be sufficient to establish abuse of discretion." *Id.* We begin our inquiry with the district court's legal determination that Article 10.3-1 of the CZO was not effectively amended until February 2002.

According to Illinois statute:

> Whenever municipal ordinances are printed in book or pamphlet form, and purport to be published by authority of the corporate authorities, *such book or pamphlet shall be prima facie evidence of the contents,* passage and legal publication of such ordinance, as of the dates mentioned in such book or pamphlet, in all courts and administrative tribunals.

65 Ill. Comp. Stat. § 5/1-2-6 (emphasis added). Christ Universal presented the district court with ample prima facie evidence that the CZO, as amended in February 2000, did not eliminate recreation buildings and community centers as permitted uses in M districts. It produced evidence of three different publications of the CZO that continued to list recreation buildings and community centers as allowed in M districts—the city council's own Journal of Proceedings, the CZO as published by Index Publishing Corporation, and the City of Chicago's Department of Zoning Web page.

The city council's Journal of Proceedings for February 16, 2000, as certified by the city clerk, reflects the passage of the CZO amendments and, according to the testimony of the deputy corporation counsel in charge of the legislative and intergovernmental division of the City of Chicago law department, generally is the document upon which the public

can rely in determining the current state of the law. According to the deputy corporation counsel, the information contained in the Journal of Proceedings is supposed to include the amended articles in full, with additions in italicized print and deletions in brackets. In this circumstance, the Journal's publisher omitted any reference to subsection 12 of Article 10.3-1—the subsection referring to recreation buildings and community centers. Instead it showed only subsection 11a renumbered as subsection 12 and the deletion of subsection 13, referring to private clubs and lodges:

> SECTION 7. That Article 10.3-1 of the Chicago Zoning Ordinance, is hereby amended by deleting the language in brackets and adding the language in italics as follows:
>
> *10.3-1 Permitted Uses—M1-1 to M1-5 Restricted Manufacturing Districts.*
>
> The following uses are permitted in the M1-1 to M1-5 Districts inclusive . . . :
>
> * * * * * *
>
> *(12)* [(11a)] Medical and Dental Clinics. (Amend. Coun J. 7-9-58, p. 7996)
>
> [(12a) Private Clubs or Lodges. (Amend.Coun. J. 10-11-61, p. 5603)]

Journal of Proceedings of the City Council, The City of Chicago, Feb. 16, 2000, pp. 26011-13.[2]

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[2] The Journal of Proceedings should have read as follows:

> *(12)* [(11a)] Medical and Dental Clinics. (Amend.Coun. J. 7-9-58, p. 7996)
>
> [(12) Municipal or Privately-owned Recreation Buildings or Community Centers.]
>
> [(12a) Private Clubs or Lodges. (Amend.Coun. J. 10-11-61, p. 5603)]

(App. to City's Supp. Br. in Opp. to the Church's Mot. for Prelim. Inj., Ex. H (Feb. 6, 2002 certified correction to the Journal of Proceedings of

Christ Universal also presented evidence that the book commonly relied upon by zoning practitioners continued to list recreation buildings and community centers as permitted uses in M districts after the passage of the CZO amendments. In the book, published by Index Publishing Corporation in 2001, former subsection 12 of Article 10.3-1, which, in the Journal of Proceedings was represented as being neither deleted nor added, but was simply absent, was added back in, but as subsection 12a:

> *10.3-1 Permitted Uses—M1-1 to M1-5 Restricted Manufacturing Districts.*
>
> The following uses are permitted in the M1-1 to M1-5 Districts inclusive . . . :
>
> * * * * * *
>
> (12) Medical and Dental Clinics. (Amend. Coun. J. 7-9-58, p. 7996; 2-16-00, p. 25997.)
>
> (12a) Municipal or Privately-owned Recreation Buildings or Community Centers. (Amend.Coun. J. 2-16-00, p. 25997.)
>
> (13) Public Utility and Public Service Uses . . . .

Title 17 Municipal Code of Chicago, Chicago Zoning Ordinance, p. 71A (2001). The publisher attributes the renumbering of what was formerly subsection 12 to subsection 12a to the CZO amendments passed February 16, 2000, as represented in the Journal of Proceedings of the City Council. *Id.*

Even more confusingly, the City of Chicago's own Department of Zoning Web page represented, as late as March 7, 2002, that recreation buildings and community centers remained as permitted uses, listing them under

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the City Council, The City of Chicago for Feb. 16, 2000, p. 26013); *see also* Def. Tr. Ex. 29(c).)

subsection 13, rather than either subsection 12 or 12a, with no attribution for the change in numbering:

> *10.3-1 Permitted Uses—M1-1 to M1-5 Restricted Manufacturing Districts.*
>
> The following uses are permitted in the M1-1 to M1-5 Districts inclusive . . . :
>
> * * * * * *
>
> (12) Medical and Dental Clinics. (Amend. Coun. J. 7-9-58, p. 7996; 2-16-00, p. 25997.)
>
> (13) Municipal or Privately-owned Recreation Buildings or Community Centers.
>
> (13a) Public Utility and Public Service Uses . . . .

(Rep. to City's Supp. Br. in Opp. to Church's Mot. for Prelim. Inj., Ex. B.) The City of Chicago zoning administrator explained, through affidavit, that the error in the electronic version was also the result of the misprint in the Journal of Proceedings. (*See* App. to City's Supp. Br. in Opp. to the Church's Mot. for Prelim. Inj., Ex. F, ¶¶ 6, 7.)

In response to this evidence, the City countered, through testimony and exhibits entered through its deputy corporation counsel, that the various published versions of Article 10.3-1 retaining recreation buildings and community centers as permitted M-district uses amounted to nothing more than an unfortunate scrivener's error. The deputy corporation counsel testified that the version actually adopted by the zoning committee, recommended for passage by the committee to the city council, and finally passed by the city council on February 16, 2000 contained the community-center deletion. He asserted that despite its mispublication, all amendments, including the deletion of subsection 12 of Article 10.3-1, were passed as of February 16, 2000 and effective March 14, 2000. Our painstaking review of the record convinces us that this is correct.

It is undisputed that the copy of MA-59, presented for passage to the zoning committee by the mayor's office, contained the deletion at issue. (See Def. Tr. Ex. 29a.) Tracing this document through the enactment process, with the aid of the unrefuted testimony of the deputy corporation counsel, we find that it was passed by the zoning committee without modification on January 25, 2000. The committee then recommended that the full city council adopt MA-59, which it did by a vote of 49 to 0 on February 16, 2000. After the city council's vote, the document was forwarded to the city clerk, who stamped it as being passed by the city council and deposited with the city clerk on February 16, 2000. (See Def. Tr. Ex. 29(c).) That document, retained in the city clerk's file, contains the community-center deletion. (*Id.*)

The deputy corporation counsel testified that after an ordinance is passed by the city council, the Mayor is given the opportunity to act on it. He has three options: he can (1) sign and return it to the city council, at which point it could become immediately effective; (2) return it to the city council unsigned with his objections, at which point it is not effective; or (3) take no action, at which point it would be considered effective at the next city council meeting, as long as the meeting occurred more than five days after the prior meeting. Here, the Mayor took no action.

Although neither party presented specific evidence on this issue, we can reasonably infer that a copy of MA-59 as passed by the city council was forwarded to the Mayor, rather than another version of the ordinance amendments containing the misprint. The city clerk's certification, attached to the hard copy of MA-59 contained in his file, states that he delivered the ordinance to the Mayor "after the passage thereof by the said City council, *without delay* [.]" (See Def. Tr. Ex. 29(c) (emphasis added)). The other versions of the ordinance containing the misprint were produced some time after the passage of the ordinance, including the Journal of

Proceedings, which was published on March 14, 2000, according to the deputy corporation counsel. Because the clerk received the original copy of MA-59 containing the community-center deletion and provided the ordinance "without delay" to the Mayor, and because no other version of the ordinance containing the misprint appears to have existed at the time, we conclude that the version the Mayor received and considered was the version containing the community-center deletion.

It is clear to us, therefore, that the city council and the Mayor intended to and did amend the CZO to include the community-center deletion as of the March 14, 2000 effective date. The misprints contained in the Journal of Proceedings, zoning book, and Department of Zoning Web page amount to nothing more than a scrivener's error. *See United States v. Gibson,* 356 F.3d 761, 766 n. 3 (7th Cir.2004) (defining scrivener's error as a synonym for "clerical error," meaning "a minor mistake or inadvertence, esp. in writing or copying something on the record . . ." (quoting Black's Law Dictionary 563 (7th ed.1999))). The district court abused its discretion in finding otherwise.

Our conclusion is further bolstered by three additional documents in the record. First, a letter from the managing editor of the Journal of Proceedings, dated September 21, 2001, acknowledges that the February 16, 2000 Journal entry recording the CZO amendments contained a printing error by failing to reflect the deletion of subsection 12, "as did the original document," and calling it an inadvertent omission. (*See* Def. Tr. Ex. 29d.)

Second, to correct the printing error, the city council did not vote again to amend Article 10.3.1 to exclude recreation buildings and community centers, as characterized by the district court. Rather, the city council simply approved a correction to the Journal at its regular meeting on February 6, 2002. (*See* App. to City's Supp. Br. in Opp. to the Church's

Mot. for Prelim. Inj., Ex. H.) This indicates that the city council believed the amendments as passed on February 16, 2000 contained the community-center deletion and that the failure to note it in the Journal did not affect its efficacy.

Finally, the zoning administrator for the City of Chicago testified via affidavit that he understood the amendments to the CZO as passed February 16, 2000 to contain the community-center deletion. (*See* App. to City's Supp. Br. in Opp. to the Church's Mot. for Prelim. Inj., Ex. F, ¶¶ 3, 5.) He affirmed that since the CZO amendments' passage by the city council in February 2000, he has administered the CZO consistent with the language of MA-59 (*Id.* at ¶¶ 5, 8). We note that it does not appear, based on the evidence and briefing presented below, that any recreation or community center attempted to locate in an M district after the February 2000 amendment prohibiting them.[3]

Because we find that CZO Article 10.3-1 was amended by the city council in February 2000 and in effect as of March 14, 2000, we also find, based on our holding in *CLUB, supra*, that the ordinance as amended was lawful at the time Christ Universal purchased its property in June 2000.[4]

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[3] We note, as well, that the district court deciding the *CLUB* case squarely faced this issue and specifically found that all amendments were enacted as of February 2000. *Civil Liberties for Urban Believers v. City of Chicago*, 2002 WL 485380, *5 n. 2 (N.D.Ill. Mar. 29, 2002), 2002 U.S. Dist. LEXIS 5913. As mentioned previously, the parties to *CLUB* did not appeal that finding, so we did not pass on this issue in *CLUB*.

[4] We observe that 65 Ill. Comp. Stat. 5/1-2-4, which outlines the method by which fine-imposing statutes should be corrected if there is an error in printing, does not apply in this circumstance. *See VonBokel v. City of Breese*, 427 N.E.2d 322, 324 (Ill.App.Ct.1981). In *VonBokel*, the court concluded § 5/1-2-4 need not be strictly adhered to because there was no evidence that the printing error resulted from any bad faith on the part of the city. In addition, the *VonBokel* court noted that it considered the error minor and one that did not affect the ordinance substantively. Similarly, here there's no evidence of anything but an oversight on the part of the

This is not to say, however, that the City is automatically off the hook. A city is estopped from enforcing an otherwise valid ordinance where its agents misinformed a party of the ordinance's substance, inducing conduct resulting in substantial loss. *See Cities Serv. Oil Co. v. City of Des Plaines*, 21 Ill.2d 157, 171 N.E.2d 605, 607-08 (1961) (listing cases). As noted above, Christ Universal amply demonstrated that the City's representations to the public in the form of various printed and electronic versions of the ordinance was that recreation buildings and community centers continued to be allowed in M districts and churches were not. This would be a very different case if Christ Universal detrimentally relied on the published representations made by the City in choosing to purchase property in an M district. However, it did not, as the district court properly found.

In another vexing twist, the purchaser, Christ Universal's pastor, Roosevelt Simpkins, testified that at the time he closed on the property in June 2000, he believed that it was zoned B (business), not M. He acknowledged that churches could not locate in B districts as of right, so that to operate at the chosen site, he would have to obtain a special use permit. It was only after he went to his alderman's office for help in acquiring the special use permit that he learned the property, which was formerly zoned B, had been "down zoned" to M almost a year prior. Unfortunately for Christ Universal, because it is clear that Pastor Simpkins did not rely on the misprinted version of the CZO in deciding to purchase the property, but rather on his mistaken belief that the property was zoned B, the church cannot support an estoppel argument.

Journal's managing editor in miscopying the approved version of the amended CZO. And, considering the negligible effects of the error outside this particular case, the City's consistent application of the ordinance as originally passed, and its subsequent efforts to correct the scrivener's error, strict adherence to the republication requirements of § 5/1-2-4 was unnecessary under Illinois law.

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In sum, we find that the CZO amendment removing recreation buildings and community centers as permitted uses in M districts was passed by the city council on February 16, 2000 and effective as of March 14, 2000—three months prior to Christ Universal's purchase of its property in June 2000. Our decision in *CLUB*, which upheld the February 2000 amendments, including the Article 10.3-1 amendment, as constitutional and in compliance with RLUIPA, thus forecloses Christ Universal's similar challenges here, which Christ Universal does not and cannot contest.[5] Because the church did not rely on the City's erroneous printing of the CZO in purchasing the property, the City is not estopped from enforcing what we have previously determined to be an otherwise lawful ordinance.

IV. CONCLUSION

The district court abused its discretion in granting Christ Universal's request for a permanent injunction, and its decision is REVERSED and the injunction VACATED.

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[5] *CLUB, supra*, was decided while the present appeal was pending, but after briefing was complete. The parties were invited to and did provide additional briefing discussing how our decision in that case impacted the present one. In its supplemental briefing, Christ Universal proceeds on the assumption that the city council did not effectively amend the CZO as of February 2000 and implicitly concedes that if all of the amendments were passed as of February 2000, *CLUB* forecloses its constitution- and RLUIPA-based claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed Dec. 17, 2002]

No. 01 C 1429

District Judge
Wayne R. Andersen

CHRIST UNIVERSAL MISSION CHURCH,
Plaintiff,

v.

CITY OF CHICAGO,
Defendant.

Amended Order Entering Permanent Injunction

On September 11, 2002, the Court entered a minute order, along with Findings of Fact and Conclusions of Law [doc # 47], thereby granting Plaintiff's motion for a preliminary injunction. The entry of the preliminary injunction order has the effect, *inter alia*, of enjoining the City of Chicago from enforcing parts of its Zoning Ordinance against Plaintiff. Among other provisions, the Court preliminarily enjoined the City from enforcing the part of its Zoning Ordinance that prohibits Plaintiff from operating a church at 7017 West Grand Avenue, which property is owned by Plaintiff.

The parties have informed the Court that the parties wish to stand on the record as compiled in the preliminary injunction hearing (including briefs and memoranda filed in conjunction with the hearing). Therefore, for the reasons' set forth in the Court's September 11, 2002 minute order and its Findings of

Fact and Conclusions of Law, the Court makes permanent all aspects of the preliminary injunction order.

To quickly summarize the Court's conclusion, and as more fully detailed in the Findings of Fact and Conclusions of Law, the Court finds that, prior to the amendment of the Zoning Ordinance in February 2002, the part of the Zoning Ordinance that prohibited Plaintiff from operating a church at 7017 West Grand Avenue (*i.e.*, the "M" zoning classification of 7017 W. Grand, coupled with the text of the "M" classification) violated Plaintiff's rights under Section 2(b) of RLUIPA and the Equal Protection Clause of the United States Constitution.

Finally, with respect to Plaintiff's various motions to supplement the record, the Court, for the reasons stated in open court, denies those motions [Docket Nos. 44-1, 50-1, and 52-1].

The Court has made no finding with regard to Plaintiff's prayer for damages and reserves all issues related thereto. However, as to the permanent injunction, this is a final and appealable order. This case is set for status on Thursday, January 30, 2003 at 10 a.m.

It is so ordered.

/s/ Wayne R. Andersen
WAYNE R. ANDERSEN
United States District Judge

Dated: December 16, 2002

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 01 C 1429

CHRIST UNIVERSAL MISSION CHURCH,
Plaintiff,

v.

CITY OF CHICAGO,
Defendant.

September 11, 2002, Decided
September 13, 2002, Docketed

JUDGES: Wayne R. Andersen, United States District Court.

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is before the Court on the motion of plaintiff Christ Universal Mission Church for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65. The plaintiff claims that the exclusion of churches, while permitting community centers, in the "M" Zone of the Chicago Zoning Ordinance is unconstitutional. For the following reasons, the preliminary injunction is granted.

FINDINGS OF FACT

1. Plaintiff, Christ Universal Mission Church (the "Church"), is a non-denominational church that currently operates out of a two-flat residential home at 1405 N. Luna,

Chicago, Illinois. Roosevelt Simpkins ("Simpkins") is pastor of the Church and has been pastor since the Church was founded in 1987.

2. Members of the Church include residents of Chicago, Harvey, Country Club Hills, Plainfield, Maywood, and Evanston; these parishioners travel to 1405 N. Luna for services.

3. The City of Chicago is a municipal corporation formed under the laws of the State of Illinois.

4. Property in the City is divided into four main zoning classifications: Residential ("R"), Manufacturing ("M"), Business ("B"), and Commercial ("C"). Churches are allowed to operate as of right in property zoned R. Churches are prohibited from operating in property zoned M. Churches are allowed to operate in property zoned B and C, so long as they obtain Special Use permits. At the time this case was filed, community centers were permitted uses in M zones but were prohibited in property zoned R.

5. In late 1998, the Church began searching for a new, larger site northwest of its current site at 1405 N. Luna. The Church needed a larger space to accommodate its congregation and sought to move northwest because Pastor Simpkins believed that it was a preferred location. Pastor Simpkins testified that Church leadership was directed by God to move northwest to an area generally bounded by Harlem Avenue, Cicero Avenue, North Avenue and Belmont Avenue. The Church's goals in targeting this specific neighborhood included racial and spiritual diversity. The Church's interest in the neighborhood goes back several years. Previously, the Church held Sunday services in that same area, at Prosser High School.

6. Pastor Simpkins was in charge of finding a new location for the Church. Pastor Simpkins believed that the Church did not have sufficient financial resources to acquire property and construct a new building in a residential area. The Church had

approximately $80,000 for a down payment and a monthly income of approximately $4,000. Therefore, Pastor Simpkins focused the search in areas zoned B and C. At the time he began the search, Pastor Simpkins knew that, if the Church acquired a property zoned B or C, the Church would need a Special Use permit to operate.

7. At the recommendation of a parishioner, Pastor Simpkins sought the help of Elder Lopez, a real estate broker familiar with the area where the Church wanted to locate. Pastor Simpkins provided Mr. Lopez with the boundaries of the area in which to search for property—Cicero Avenue on the east, Harlem Avenue on the west, North Avenue on the south, and Belmont Avenue on the north—and specifically informed Mr. Lopez of his intent to operate a church at the selected location.

8. Mr. Lopez showed Pastor Simpkins properties zoned B and C because Mr. Lopez was under the misimpression that churches could not locate in R districts. During his two-year search, Mr. Lopez identified two sites that the Church was seriously interested in, 6050 W. Fullerton and 7017 W. Grand, both of which were zoned B.

9. In late 1998, Mr. Lopez showed Pastor Simpkins a property located at 7017 W. Grand Avenue, Chicago. At the time Mr. Simpkins first viewed the property, a podiatrist's office occupied 1/3 of the property at 7017 W. Grand, while 2/3 of the property was vacant.

10. When Pastor Simpkins first viewed the property, 7017 W. Grand was zoned B2-2. This zoning classification was indicated on the Multiple Listing Service printout, which Mr. Lopez consulted in locating potential properties for the Church.

11. In January 1999, after Pastor Simpkins viewed 7017 W. Grand, he decided to make an offer for the property. The owner of the property was Dr. Mark Spaccapaniccia.

Dr. Spaccapaniccia was represented in the transaction by his real estate broker, Laurencio Esparza.

12. In January 1999, before making an offer on the property, Pastor Simpkins went to the office of Alderman William Banks. 7017 W. Grand Avenue is located within the 36th Ward, Alderman Banks' ward. Pastor Simpkins believed that he would need the Alderman's assistance in obtaining a Special Use permit for the church.

13. The Pastor's testimony regarding his January 1999 visit to the Alderman's office was so vague that the Court draws no factual conclusions regarding what, if anything, transpired during the visit. The Court does conclude that the visit did not result in either Alderman Banks or any member of his staff knowing about the intended purchase or proposed use of 7017 W. Grand. After that visit, Pastor Simpkins did not attempt to contact the Alderman until June 2000, after the Church closed on the property.

14. In January 1999, the Church tendered a written offer on the property to Dr. Spaccapaniccia. Upon the advice of his real estate broker and attorney, Pastor Simpkins specifically requested that the contract contain a zoning contingency clause so that the Church would not have to complete the sale if it failed to obtain a Special Use permit.

15. On February 22, 1999, the Church and Pastor Simpkins entered into a contract for the purchase of the property with a tentative closing date of April 31, 1999. This contract contained a zoning contingency clause.

16. To the best of Pastor Simpkins' knowledge, no one knew about the contract dated February 22, 1999 except the seller, the real estate brokers, the attorneys, the Church members, and himself; the contract was not recorded with the Recorder of Deeds.

17. Because the Church was unable to obtain financing for the purchase of 7017 W. Grand, the closing did not occur on April 31, 1999 or any time during the spring or summer of 1999. Because both the Church and Dr. Spaccapaniccia considered the deal dead, Dr. Spaccapaniccia returned the Church's earnest money in August 1999. From August 1999 to December 1999, Pastor Simpkins and Mr. Lopez lost interest in 7017 W. Grand and searched for another property for the Church.

18. In March 1999, Alderman Banks introduced a proposed ordinance ("the Ordinance") to re-zone the 7000 block of W. Grand from B to M. At the time the proposed re-zoning was introduced, none of the properties on the 7000 block of W. Grand was used in a manner traditionally associated with manufacturing. The Court concludes that no manufacturing use is likely for that block in the foreseeable future. The City's Zoning Department recommended against re-zoning 7000 block of W. Grand to M. The City's expert witness, Tom Smith, also gave his opinion that he would have recommended against the change.

19. Alderman Banks testified that he introduced the re-zoning Ordinance in response to a recommendation by the Montclare-Galewood community organization and in an effort to maximize "community input" in the future development of the block. Within the City of Chicago, this type of re-zoning, *i.e.*, from a more inclusive category to a less inclusive category, was not unique to the 7000 block of W. Grand.

By "downzoning" parcels of property or city blocks to categories incompatible with the probable use of the property, the City Council, in effect, forces all buyers to seek a re-zoning from it in order to use the property.

20. At the time he introduced the re-zoning, Alderman Banks was unaware of the Church's interest in 7017 W. Grand.

21. Consistent with the City's ordinances and procedures, all owners on the 7000 block of W. Grand, including Dr. Spaccapaniccia, were notified of the proposed re-zoning Ordinance and on April 15, 1999 the City Council Committee on Zoning conducted a public hearing on the proposed Ordinance.

22. Neither a representative from the Church nor Dr. Spaccapaniccia appeared at the April 15, 1999 Zoning Committee hearing. No one who attended the April 15, 1999 hearing voiced an objection to the proposed Ordinance.

23. At the April 15, 1999 hearing, the Zoning Committee approved the re-zoning for the 7000 block of W. Grand and recommended passage of the zoning amendment to the full City Council. In April 1999, the City Council passed legislation re-zoning the 7000 block of W. Grand, including the property at 7017 W. Grand, to M.

24. Around New Year's Day, 2000, the Church again became interested in the property at 7017 W. Grand. In early January 2000, Mr. Lopez contacted Mr. Esparza, and told him of the Church's renewed interest in the property.

25. Mr. Lopez reviewed the Multiple Listing Service information sheet on the property prior to re-showing the property in January 2000. By January 2000, the MLS listing sheet had been changed to indicate that the property was now zoned M. However, the MLS listing sheet also noted that the property would be ideal for a church-use (even after the zoning had been changed to M).

26. Mr. Lopez testified that he did not notice the change of the zoning classification on the MLS listing and had never in his 10 years as an agent/broker seen a property re-zoned while listed for sale. Mr. Lopez testified that the seller's agent never told him of the zoning change. The seller's agent, Mr. Esparza, testified that he specifically informed Mr. Lopez of the change in zoning, although he did not provide Mr. Lopez

with the formal notice of the proposed change, which had been sent by the Zoning Committee to the owner.

27. In January 2000, Pastor Simpkins believed that the property at 7017 W. Grand was still zoned B and knew that, if the property was zoned B, the Church would need a Special Use permit.

28. In early 2000, a period during which he assumed the property was still zoned B, Pastor Simpkins made no effort to contact Alderman Banks about obtaining a Special Use permit, nor did Pastor Simpkins make any attempt to meet with local community groups about obtaining a Special Use permit.

29. On January 7, 2000, Pastor Simpkins and Dr. Spaccapaniccia signed a new contract for the property at 7017 W. Grand. Unlike the February 22, 1999 contract, the January 2000 contract failed to contain a zoning contingency clause.

30. In June 2000, Pastor Simpkins closed on the property at 7017 W. Grand. Pastor Simpkins acquired the property at 7017 W. Grand for the Church. At the time of closing, Pastor Simpkins knew that there were legal barriers to the operation of a church, including, he believed, the need for a Special Use permit.

31. Sometime after the closing, Pastor Simpkins and his wife went to Alderman Banks' office to seek his assistance in getting a Special Use permit. A man working in the office explained that there was no reason to meet with the Alderman about obtaining a Special Use permit because the property was now zoned M and that the Church could not obtain a Special Use permit to operate in an M zone.

32. Sometime in the summer of 2000, a friend suggested that Pastor Simpkins meet with Charles Bowen, who was described as the Mayor's liaison for religious issues, regarding the Church's zoning problem. Pastor Simpkins met

with Mr. Bowen at City Hall and sought Mr. Bowen's assistance in setting up a meeting with Alderman Banks. Mr. Bowen offered to set up a meeting between the Pastor and the Alderman. Mr. Bowen, however, never followed-up with Pastor Simpkins and the meeting with Alderman Banks never took place. Mr. Bowen did not return the Pastor's subsequent phone calls.

33. In August 2001, while the block was zoned M, the Hispanic Bible College petitioned the City Council for a re-zoning of its parcel down the block from 7017 and was successful in having its property re-zoned to from M to B.

34. Within the Church's target area, no existing church buildings came on the market during the church's 2-year search.

35. Churches are allowed to operate as of right in property zoned R. Within the City of Chicago 50% to 55% of developable land is zoned R.

36. The majority of land bounded by North Avenue on the south, Belmont Avenue on the north, Cicero Avenue on the east, and Harlem Avenue on the west, is zoned residential.

37. There are over 10,000 acres of vacant property available throughout the City, much of which is zoned R. Property that is zoned R and currently occupied may also be suitable for churches.

38. Under the City's current zoning scheme, many new churches have successfully opened in the City within the last 5 years.

39. Community centers are not defined by the City's zoning ordinance. The only definition provided in this case by either party is that of the City's former zoning administrator, Paul Woznicki, who testified that a "community center" must simply be "community-based" (Woznicki Dep at 30-31.) As examples, Woznicki noted a community "head-start" program

or a "community theater organization." (*Id.*) Woznicki also testified that a church might be permitted to meet at a "community center" as long as a "church" use was not the predominate use of the facility. (*Id.* at 32.) Furthermore, he stated that he was unable to rationalize the City's decision to allow "community centers" and similar uses in zones where churches were prohibited because the "nature of religion" had "changed" since the Zoning Ordinance's adoption in 1957. (*Id.* at 33.) He suggested that revisions to the Code were now necessary. (*Id.* at 34.)

40. The City has conceded that "community centers" and "churches" were both "religious/nonreligious assemblies" for the purposes of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*

41. The City submitted the testimony of Tom Smith, an official from the City Planning Department, to provide its basis for allowing community centers, but disallowing churches, in its M zone. The City submitted deposition testimony of Smith from *C.L.U.B. v. City of Chicago*, (N.D. Ill. 94 C 6151) wherein Smith gave three reasons for allowing community centers, but disallowing churches, in the M zone:

> A. Most churches would rather locate in more peaceful and quiet locations than a noisy manufacturing zone. (Smith Dep. at 165.)
>
> B. Manufacturing zones need to be reserved for job-creating activities (i.e. traditional manufacturing). (Smith Dep. at 166.)
>
> C. "Community Centers" may have at one time been considered an "affiliated use" with the manufacturing uses, but are no longer considered as such and the City has taken steps to remove such uses from manufacturing areas. (Smith Dep at 160.)

42. The City also contends that it was logical to include community centers as permitted uses in M zones because they had been excluded from R zones, whereas churches were included in R zones and, therefore, did not need to use M zoned property.

43. Smith also personally testified in this case. He was asked whether there was a reason for treating community centers and churches differently in the City's M zone and he responded that, in his opinion, churches like community centers are assembly uses. He further stated that "we have tried to amend the Code to put everybody on equal footing in that regard because I think there are similarities." (Trial Transcript at 240-41.)

44. The collective testimony of Smith and Woznicki illustrates that the City itself has been confused on why it allowed community centers, but not churches, in M zones. As a factual matter, Smith's most recent testimony supports the Church's contention that the "church" and "community center" land uses are similar and should be treated the same. Woznicki's testimony illustrates the similarities between community centers and churches and further calls into question any reason for treating the two differently in terms of locating in an M zone.

45. In February 2000, during the time the Church was negotiating the purchase of the property at 7017 W. Grand, the City Council passed an amendment to the zoning ordinance.

46. According to the City, the intended effect of this amendment to the ordinance was to rectify a problem in the ordinance whereby certain assembly uses, including "municipal or privately owned recreation buildings and community centers," were permitted in M zones. The amendment was supposed to delete "community centers" from the M zone classification.

47. The City Clerk failed to note the passage of the amendment to the ordinance in the City Council's Journal of Proceedings (the official publication of the City of Chicago's ordinances). Consequently, subsequent publications of the zoning ordinance did not reflect the deletion of community centers from M zones.

48. In apparent recognition of the inconsistency of including community centers while excluding churches from M zones, the City Council again voted to amend the permitted uses of M zones to exclude community centers. This amendment did not become effective until February 6, 2002. On that date, community centers were finally removed as a permitted use in M zones.

49. In January 2002, the Church began holding religious services at its 7017 W. Grand property. Fearing that the City would ultimately delete community centers as a permitted use before the completion of this litigation, the Church began meeting at its site to establish itself as a legal use at that location. The Church and the City subsequently entered into a stipulation agreeing that the Church would discontinue its meeting at 7017 W. Grand until our ruling in this case and that the Church could maintain any and all property rights that had been established by initiating religious use of the property in January 2002.

CONCLUSIONS OF LAW

1. A party seeking to obtain a preliminary injunction must, at a minimum, demonstrate that: (1) its case has some likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted. If the movant cannot demonstrate these *prima facie* elements, its motion for preliminary injunction should be denied. *Ty Inc. v. The Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001); *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998).

2. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).

3. Since the evidence shows that "community center" and "church" uses are similar, it becomes necessary to determine which standard of scrutiny should be applied to determine whether the City has unjustifiably discriminated against churches by excluding them from its M zone. Three different standards of scrutiny potentially apply to this case:

A. *RLUIPA § 2(b)*: Provides that "no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). The statute provides no rational basis or strict scrutiny "escape hatch" for a city that has violated its provisions. Thus, any discrimination against churches must be judged on a "strict liability" standard.

B. *STRICT SCRUTINY*: If a legislative classification discriminates upon the basis of a suspect class (i.e. race, alienage, religion) or impinges upon the exercise of a fundamental personal right (i.e., free speech, freedom of religion) it must meet the exacting "compelling interest" standard. *McLaughlin v. Florida*, 379 U.S. 184, 192, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964); *see also Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982); *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971), *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir. 1984).

C. *RATIONAL BASIS*: If no suspect class or fundamental right is involved, the general rational basis rule applies. "The general rule is that legislation is presumed

> to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. . . ." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 447-48, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

4. This Court need not decide whether the Church is entitled to heightened scrutiny under either RLUPIA § 2(b) or Equal Protection/Strict Scrutiny. The Court finds that the City's exclusion of "churches" from its M zone while "community centers" were permitted has not been supported by a rational basis and must be struck down on that basis alone. Having found that there is no rational basis for discriminating against churches in this way, it is unnecessary for the Court to decide whether or how to apply RLUIPA's or strict scrutiny's more exacting standards.

5. Rational basis review requires this Court to examine whether permitting Churches in an M zone "would threaten legitimate interests of the city in a way that other permitted uses [such as community centers] would not." *City of Cleburne*, 473 U.S. at 448; *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991) ("Under the equal protection clause we must consider whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone. Any differentiation must be relevant to the objectives the City is attempting to achieve through its ordinance [citing *Cleburne*]").

6. This Court fails to see a rational basis for the City's exclusion of churches from M zones while allowing "community centers." The City's testimony that churches would generally prefer to locate in quieter, non-manufacturing areas is questionable on its face considering the extraordinary

diversity of churches in Chicago and fails to point to any legitimate interest of the City that is threatened by the presence of churches, as required by *Cleburne*. The City's testimony that it wishes to keep M zones as centers for employment is understandable but does not begin to explain why churches should be treated any differently than community centers or the other non-manufacturing uses allowed in M zones which do not typically employ a large number of workers. Finally, the collective testimony of the City's expert, Tom Smith, and the City's former Zoning Administrator, Paul Woznicki, points to the fact that: 1) the City considers community centers and churches to be similar uses; 2) community centers and churches should be placed on "equal footing;" and 3) community centers are no longer considered an ancillary use to manufacturing. This is further supported by the City's subsequent decision to delete community centers as a permitted use in M zones in February 2002.

7. The Court finds the following cases persuasive in reaching this decision. Each case below struck down zoning restrictions (several against churches) based on the Equal Protection Clause:

> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985): The Supreme Court ruled that the exclusion of group home for the mentally retarded violated the "rational basis" test where the city permitted apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes, private clubs and fraternal orders in the same R-3 zone.
>
> *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991):
>
> The Eighth Circuit held that the city had not demonstrated a rational basis for prohibiting churches in its C-3

zone where it freely allowed commercial establishments, public and semi-public buildings, private clubs, second-floor apartments, parking lots and accessory uses.

Congregation Kol Ami v. Abington Township, 161 F. Supp. 2d 432 (E.D. Pa. 2001): The court struck down the township's unequal treatment of houses of worship in its R-1 district on rational basis grounds by stating that "indeed, there can be no rational reason to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, county club or other similar use to request a special exception under the 1996 Ordinance, but not Kol Ami." 161 F. Supp. 2d at 434.

Vineyard Christian Fellowship v. City of Evanston, (N.D. Ill., No. 00 C 0798): In granting the plaintiff-church a preliminary injunction, Judge Pallmeyer concluded that the church had shown a likelihood of success on its constitutional claims. Judge Pallmeyer noted that the church had been discriminated against in that the city excluded "religious institutions" from the O1 zoning district, but permitted "cultural facilities," "auditoriums," and "membership organizations." Judge Pallmeyer concluded that "although Vineyard could host an assembly of the same number of persons, play music, dance, sing, chant, listen to lectures or converse, it may not engage in worship activities. In short, Vineyard members are free to party, but are not free to pray." *Vineyard Christian Fellowship*, slip op., at page 3.

8. The Court further rejects the City's argument that its entire zoning code must be examined to determine whether churches are treated unconstitutionally in M zones. The City has noted that it treats churches more favorably than "community centers" in R zones, thus balancing out any unequal treatment of churches in the M zones. However, the City cites no authority for its position that the entire zoning

scheme must be examined to determine the constitutionality of its exclusion of churches in the M zone. In fact, the Court specifically notes that *City of Cleburne* and each of the other church zoning cases cited above applied a "zone" approach in determining that the exclusion of churches from a particular zone violated the Equal Protection Clause. The courts did not regard how churches were treated in other parts of the city, but instead compared the permitted/non-permitted uses of the particular zones in question. The Court sees no reason to vary from this established standard.

9. The Court also notes that, even if the City were to demonstrate a rational basis for its discrimination against churches in M zones, such a showing would not satisfy RLUIPA § 2(b) which, as mentioned above, does not allow the City to escape liability by showing a "rational basis" liability. As discussed above, RLUIPA § 2(b) is a strict-liability statute and the City has conceded in this case that "community centers" and "churches" are both "assembly uses" for the purposes of that statute.

10. With respect to the City's argument that RLUIPA is unconstitutional, we disagree and, as support, adopt as our own the reasoning of Judge Dalzell of the United States District Court for the Eastern District of Pennsylvania in *Freedom Baptist Church of Delaware County v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

11. Finally, because this Court finds the Church to be a legally permitted use prior to the February 6, 2002 deletion of "community centers" and because the Church began using the property for religious services prior to the code amendment, the amendment cannot operate to divest the Church of its right to continue using the property. Alderman Banks testified that a zoning code amendment does not affect preexisting legal users. (Trial Transcript at 146.) The Church also submitted authority showing that it is entitled to continue operating at 7017 West Grand as a nonconforming legal use.

Pioneer Trust & Savings Bank v. County of Cook, 71 Ill. 2d 510, 522-23, 377 N.E.2d 21, 26, 17 Ill. Dec. 831 (1978), *Village of Oak Park v. Gordon*, 32 Ill. 2d 295, 298, 205 N.E.2d 464, 466 (1965). The City counters that the Church was not a legal use prior to February 6, 2002 because the zoning ordinance did not list "churches" as a permitted use in M1 zones. However, this Court's determination that the Church was a permitted use pursuant to the Equal Protection Clause overrides the zoning code's text.

Limitations of This Ruling

1. Following the February 6, 2002 amendment to the zoning ordinance, which properly removed community centers from the list of permitted uses in M zones, we conclude that the zoning ordinance as a whole does not violate the Equal Protection Clause of the Fourteenth Amendment.

2. Our holding today is not intended to conflict with Judge Hibbler's ruling in *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001). The City's decision to forbid both churches and community centers from operating in M zones while allowing churches to operate in R zones is a rational exercise of the City's undisputed authority to regulate urban development.

3. Our conclusion is strictly limited to the circumstances of the Church's acquisition of the property at 7017 W. Grand. During the time period in which the Church was considering purchasing the property, we find there was no rational basis for the City's decision to include community centers in M zones while excluding churches from those areas. Consequently, from April 1999 until February 2002, the City's zoning ordinance violated the Equal Protection Clause of the Fourteenth Amendment as to the property location at 7017 W. Grand.

CONCLUSION

For the foregoing reasons, the Church's motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 is granted. It is hereby ordered that the City, its agents, and its employees are enjoined from preventing or attempting to prevent Christ Universal Mission Church from using the property located at 7017 W. Grand Avenue in Chicago, Illinois as a church and are specifically ordered to process and issue all building permits and grant all other rights and privileges to Christ Universal to use 7017 W. Grand as if "church" were a permitted use of said property under the Chicago Zoning Ordinance. All other pending motions, including the motion for summary judgment filed by the Church [Docket # 32-1], are denied as moot.

It is so ordered.

Wayne R. Andersen

United States District Court

Dated: September 11, 2002

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 1, 2004

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. TERENCE A. EVANS, *Circuit Judge*

No. 02-4119

CHRIST UNIVERSAL MISSION CHURCH,
Plaintiff-Appellee,

v.

CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 01 C 1429

Wayne R. Andersen, *Judge*.

ORDER

The slip opinion issued in the above-entitled cause on March 26, 2004, is amended as follows:

Page 12, at the end of the first full paragraph, insert a footnote following the lines ". . . the ordinance as amended

was lawful at the time Christ Universal purchased its property in June 2000."

> We observe that 65 Ill. Comp. Stat. 5/1-2-4, which outlines the method by which fine-imposing statutes should be corrected if there is an error in printing, does not apply in this circumstance. *See VonBokel v. City of Breese*, 427 N.E.2d 322, 324 (Ill. App. Ct. 1981). In *VonBokel*, the court concluded § 5/1-2-4 need not be strictly adhered to because there was no evidence that the printing error resulted from any bad faith on the part of the city. In addition, the *VonBokel* court noted that it considered the error minor and one that did not affect the ordinance substantively. Similarly, here there's no evidence of anything but an oversight on the part of the Journal's managing editor in miscopying the approved version of the amended CZO. And, considering the negligible effects of the error outside this particular case, the City's consistent application of the ordinance as originally passed, and its subsequent efforts to correct the scrivener's error, strict adherence to the republication requirements of § 5/1-2-4 was unnecessary under Illinois law.

Further, on consideration of the petition for rehearing filed in the above-entitled cause, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

MOTION FILED
DEC 3 - 2004

(2)

No. 04-591

IN THE
Supreme Court of the United States

CHRIST UNIVERSAL MISSION CHURCH,
Petitioner,

v.

CITY OF CHICAGO,
Respondent,

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF AMERICAN JEWISH CONGRESS; BAPTIST GENERAL CONFERENCE; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.); FOUNDATION FOR THE PRESERVATION OF THE MAHAYANA TRADITION, INC.; INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL; THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH; AND WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 04-591

CHRIST UNIVERSAL MISSION CHURCH,

Petitioner,

v.

CITY OF CHICAGO,

Respondent,

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF AMERICAN JEWISH CONGRESS; BAPTIST GENERAL CONFERENCE; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.); FOUNDATION FOR THE PRESERVATION OF THE MAHAYANA TRADITION, INC.; INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL; THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH; AND WORLDWIDE CHURCH OF GOD FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici curiae American Jewish Congress; Baptist General Conference; The Church of Jesus Christ of Latter-day Saints; General Conference of Seventh-day Adventists; General Council on Finance and Administration of the United Methodist Church; Clifton Kirkpatrick, as the Stated Clerk of the Presbyterian Church (U.S.A.); Foundation for the Preservation of the Mahayana Tradition, Inc., International Church of the Foursquare Gospel; the Northern Illinois Conference of the United Methodist Church; and Worldwide Church of God respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

The petitioner has granted its written consent to the filing of this brief. *Amici* have yet to hear whether respondent United States, which has waived its response to the petition, will also grant consent. Respondent City of Chicago has withheld its consent, necessitating this motion.

Amici are national and regional religious organizations, with millions of members, that support an interpretation of the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), which provides meaningful protections for religious land uses. *Amici* are concerned that the decision below, which further entrenches the Seventh Circuit's excessively high threshold for bringing free exercise and RLUIPA claims, will have nationwide adverse consequences on the ability of religious organizations to construct houses of worship and religious instruction. Accordingly, *amici* support the petition for a writ of certiorari.

As religious organizations whose members or affiliates depend on religious meetinghouses for the exercise of their respective religions, each of the *amici* also has a direct and vital interest in the proper interpretation and application of constitutional and statutory protections for religious land uses.

The specific interests of the *amici* are set forth in the addendum to this brief.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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December 2, 2004

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INTEREST OF THE *AMICI*[1]

The interest of the *amici* is set forth in the accompanying motion for leave to file and in the addendum to this brief.

REASONS FOR GRANTING THE PETITION

Religious organizations seeking to construct or renovate religious meetinghouses often experience unreasonable hostility and opposition from local land use bodies. The biggest problem is land use standards that grant regulators virtually limitless discretion to reject religious land uses for wholly arbitrary or even invidious reasons, coupled with extremely deferential standards of judicial review. In response to this nationwide problem, Congress enacted RLUIPA to subject discretionary land use decisions to meaningful judicial scrutiny. *Amici* and numerous other religious land users depend heavily on RLUIPA's protections.

The Seventh Circuit, with its decision below, has persisted in applying a legal standard that will have nationwide adverse consequences on the ability of religious organizations to construct houses of worship. The Seventh Circuit has created such a high standard for establishing when land use decisions impose a substantial burden on religious exercise that the protections of the Free Exercise Clause and RLUIPA would often be rendered meaningless. As demonstrated below, this standard conflicts with the decisions of other circuits and lower courts, is contrary in principle to this Court's prior decisions and teachings, and violates the express intent of Congress in enacting RLUIPA. *Amici* urge this Court to grant the petition to resolve these conflicts and to reaffirm a

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[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

substantial burden test consistent with this Court's prior free exercise jurisprudence and the stated purpose of RLUIPA.

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE SEVENTH CIRCUIT'S SUBSTANTIAL BURDEN STANDARD SEVERELY UNDERMINES VITAL CONSTITUTIONAL AND STATUTORY PROTECTIONS FOR RELIGIOUS LAND USE.

A. Discriminatory and Arbitrary Land Use Regulations Create Significant Religious Hardships.

1. The right to worship God according to one's own conscience is fundamental. For tens of millions of Americans, "worship" means worship in community – in chapels, synagogues and other religious meetinghouses, in the communion and strength of fellow believers. In many faiths, vital elements of worship can only be experienced in community. A sermon or homily has little significance without an audience. Religious ceremonies and sacraments are usually performed in a communal context. Prayer meetings, Bible study sessions, and religious choirs are but a few of many examples of group worship and religious exercise. As believers worship together, religious exercise acquires meaning and significance that transcend the individual.

The ability to erect religious meetinghouses where communities of faith may gather and worship is therefore indispensable to religious liberty. "The physical embodiment of a religious group – its church – represents its ability to speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices* [hereinafter "Storzer & Picarello"], 9 Geo. Mason L. Rev. 929, 945 (2001). As Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space

adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. S7774 (daily ed. July 27, 2000).

When land use regulators prohibit or significantly constrain the construction or renovation of a house of worship, they often impose considerable religious hardships. This may be true because the prohibition results in people literally having no place to worship; in such instances, the land use regulation is a direct prohibition on the free exercise of religion. But religious hardship can also arise where regulatory obstacles bar the construction or expansion of a house of worship that is necessary to alleviate overcrowding, reasonably accommodate new members, or enable certain religious practices.

The mere fact that it is physically possible for current and prospective members of a church[2] to cram into an existing or makeshift meetinghouse does not imply that denying the right to build or adequately expand a house of worship creates no hardship. Overcrowding can be a significant impediment to religious exercise. Lack of seating in the main sanctuary inevitably forces some congregants to stand in foyers and hallways, precluding direct participation in worship services. Essential religious courses cannot be taught to everyone interested. Prospective members become discouraged because the congregation has no room for them. Parents lack adequate space to care for restless children. The quality of services and the contemplative atmosphere conducive to worship suffer.

Similarly, the design of churches is "freighted with religious meaning," and particular liturgies require particular building designs. *First Covenant Church* v. *Seattle*, 840 P.2d 174, 182 (Wash. 1992); *Society of Jesus of New England* v. *Boston Landmarking Comm.*, 564 N.E.2d 571, 573 (Mass.

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[2] The term "church" is used inclusively to refer to religious organizations generally, whether Christian, Jewish, Muslim, Buddhist, Hindu, etc.

1990). Such features as the sanctuary, altar, steeple, counseling rooms, and classrooms all are critical to religious practice. Restricting the construction or expansion of churches to preclude any of these necessary features can greatly burden religious exercise. In brief, substantial religious hardships often arise when regulators significantly constrain a church's ability to construct adequate facilities.

2. Municipal land use regulators are often hostile toward religious land uses, or at a minimum insensitive to the religious hardships just described. In the experience of these *amici*, discriminatory and arbitrary treatment of religious land uses by municipalities poses significant obstacles to religious exercise. Religious organizations of all faiths face widespread and increasing pressure by municipal authorities nationwide to limit their physical presence in America's cities and towns. See, *e.g.*, Storzer & Picarello, 9 Geo. Mason L. Rev. at 929.

Prior to the enactment of RLUIPA, during nine hearings over three years, Congress amassed substantial evidence of pervasive religious discrimination and violations of free exercise rights in the area of land use, especially in respect to minority faiths. As summarized by Senators Kennedy and Hatch in their Joint Statement in support of RLUIPA:

> The hearing record compiled massive evidence that this right [freedom to worship] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.
>
> The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical – from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept. 9, 1999), and in Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 769-83 (1999).

146 Cong. Rec. S7774.[3]

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[3] *See also* H.R. Rep. No. 106-219, at 17-24 (1999) (summarizing hearing testimony); *see generally* Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998); *see also Guru*

In addition to laws with an overtly anti-religious purpose, congressional hearings uncovered many ostensibly benign land use laws that are systematically applied to reach anti-religious results. For example, a survey of twenty-nine zoning codes from suburban Chicago indicated that in twelve of these codes churches (unlike other assembly uses) could not locate *anywhere* as of right without a special use permit, giving regulators wide discretion over religious land use.[4] Witnesses repeatedly testified about regulators barring churches from worshipping in buildings previously used by non-religious assemblies and of instances where non-religious assemblies were not subject to the same restrictions.[5] Congress found that some municipalities totally exclude new churches by cleverly authorizing religious uses only in places where churches already exist. Thus, "[t]he code shows multiple sites for churches but in fact all new churches are totally excluded." Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 773-74; H.R. Rep. No. 106-219, at 19 (1999).

Nanak Sikh Soc'y of Yuba City v. *County of Sutter*, 326 F.Supp.2d 1140, 1161 (E.D. Cal.), *appeal docketed*, No 03-17343 (9th Cir. Dec. 24, 2003) (relying on the Joint Statement); *Murphy* v. *Zoning Comm'n of Town of New Milford*, 289 F.Supp.2d 87, 118 (D. Conn. 2003) (same); *Freedom Baptist Church of Delaware County* v. *Township of Middletown*, 204 F.Supp.2d 857, 861-63 (E.D. Pa. 2003) (same).

[4] *See* H.R. Rep. No. 106-219, at 18; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); Douglas Laycock, *State RFRAs and Land Use Regulation* [hereinafter "Laycock"], 32 U.C. Davis L. Rev. 755, 773-74 (1999) (summarizing congressional record; Laycock's article was incorporated into the congressional record at 146 Cong. Rec. S7774).

[5] H.R. Rep. No. 106-219, at 19, 21, 23; *Life Teen, Inc.* v. *Yavapi County*, No. Civ 01-1490, slip op. at 32 (D. Ariz. Mar. 26, 2003) ("Congress found that the vague, discretionary, and subjective standards applied to land use decisions resulted in widespread discriminatory application of land use regulations to religious assemblies.").

Congress also found, as the First Circuit has summarized, the increasingly common "phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones – because tax-exempt churches dampen the vibrancy of commercial development." *Boyajian* v. *Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000). Opposition to new churches in residential zones is of course familiar. For example, Congress heard about *Orthodox Minyan of Elkins Park* v. *Cheltenham Township Zoning Hearing Board*, 552 A.2d 772 (Pa. Commw. 1989), where the zoning board denied an application of an Orthodox Jewish congregation because the proposed building lacked parking spaces – even though such spaces were unnecessary since Orthodox Jews do not drive on the Sabbath – but when the congregation amended its proposal to include added spaces, the board again denied the application because it would generate too much traffic. H.R. Rep. No. 106-219, at 23. But Congress also found that "increasing numbers of the recent cases involve opposition to churches in commercial zones, or even industrial zones" because officials oppose taking such lands off the tax rolls. Laycock, 32 U.C. Davis L. Rev. at 761. As Professor Laycock summarizes, the "practical effect [of this] is continuous opposition to any new places of worship, with local officials offering real or imagined or wholly phony land use concerns as a subterfuge to fight the state legislature's policy of tax exemption," resulting in "widespread political and governmental opposition to the exercise of a core First Amendment right." *Id.* at 761-62.

Independent studies have confirmed these problems and the religious hardships they impose. One study demonstrated an overwhelming, nationwide pattern of discrimination in zoning decisions involving small religious groups. *Id.* at 770-71; see Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise*, 32 U.C. Davis L. Rev. 725, 731 (1999) (describing study: fully one-half to two-

thirds of reported cases involve minority religions). As Congress found, new, unfamiliar, and minority faiths are particularly vulnerable to unconstitutional treatment at the hands of land use regulators. See *supra* 146 Cong. Rec. S7774. And yet every denomination is in the minority somewhere in the country and thus vulnerable to such treatment. One survey demonstrated that arbitrary land use treatment is far more prevalent, even with respect to familiar mainline denominations, than the case law suggests, with reported cases being just the "tip of the iceberg." Laycock, 32 U.C. Davis L. Rev. at 772-73.

3. Based on their on-going experience with numerous land use bodies across the nation, *amici* can attest that congressional concerns about religious hardships arising from discriminatory and arbitrary treatment of religious land uses were well founded. Too frequently *amici* encounter outright anti-religious bias and discrimination, sometimes directed toward religious land uses generally and sometimes directed specifically at our particular faith communities. Occasionally that bias is overt and easily discernable, but most often it is difficult to prove even when clearly present; local land use bodies are usually too sophisticated to include evidence of their own bias in the record. As one court accurately noted:

> Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

Am. Friends of the Soc'y of St. Pius v. *Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979). Where residential zones are at issue, *amici* have found that land use officials commonly

undervalue the religious needs of churches and dramatically overvalue the minor, even trivial, concerns of neighbors who oppose anything but purely residential development.

Amici can also confirm congressional findings that municipalities increasingly seek to exclude churches from commercial and industrial zones as allegedly inconsistent with their business development and tax collection agendas. Land use officials often fight tooth and nail to hinder the construction or expansion of much-needed houses of worship, whether in residential, commercial, or industrial districts. Two representative examples illustrate the types of obstacles *amici* routinely face.

a. *The Church of Jesus Christ of Latter-day Saints.* In 2002, after an extensive search for appropriate property, the Church of Jesus Christ applied to build a 16,558 sq. foot meetinghouse on a 3.85-acre parcel in a residential area of the City of West Linn, Oregon. The Church needed the meetinghouse because its West Linn members had no place within city limits to worship and because the meetinghouse in the neighboring city had become very overcrowded. The Church designed the building specifically to address the religious needs of its local members; literally every element of the building was necessary for religious worship, instruction, or ministry. Under city zoning law, houses of worship are not permitted outright anywhere in the city but are conditional uses. The proposed church complied with all objective zoning standards and land use regulations pertaining to size, height, parking, and so forth, and the Church repeatedly expressed its willingness to comply with any reasonable requirement to mitigate subjective aesthetic and design concerns. After the Church agreed to extensive landscaping and other conditions, the city's professional planning staff recommended granting a conditional use permit.

However, implacable neighborhood opposition arose to any Church meetinghouse on the property. The city rejected the

planning staff's recommendation and denied the application despite the Church's religious needs. Officials based their decision on amorphous and wholly subjective criteria, such as that the proposal did not provide "adequate area for aesthetic design treatment." The Oregon Court of Appeal sustained the City's denial by applying the Seventh Circuit's onerous substantial burden standard. The Supreme Court of Oregon has granted discretionary review on the issue of substantial burden under RLUIPA. See *Corporation of the Presiding Bishop* v. *City of West Linn*, 86 P.3d 1140, 1142 (Or. App. 2004), *appeal docketed*, No. S51504 (Or. Aug. 10, 2004).

b. *Vision Church, United Methodist.* In 2000, Vision United Methodist Church, a predominantly Korean congregation, purchased a vacant 27-acre parcel in a relatively rural suburban area of unincorporated Lake County, Illinois, just outside the Village of Long Grove. Because many of its members lived near Long Grove and its current meetinghouse was too small, the Church sought to construct a new house of worship on the parcel. Village planners led the Church to believe it could easily obtain land use approval, so the Church applied for Village annexation of the property, an appropriate zoning designation, and permission to build. However, opposition from Village officials and citizens, some of it laced with thinly veiled racial slurs and innuendos, was intense and the application was rejected. Land use officials questioned whether it was proper for a church comprised primarily of non-residents to be located in their Village.

The Church then applied to Lake County for the requisite land use approvals. But when County approval was imminent, the Village changed course and forcibly annexed the land. The Village then amended its zoning ordinance to preclude construction of any kind of church on the parcel. The amendment also had the effect of preventing the Church from constructing its church anywhere in the Village. As a result, Church members were forced to share worshiping space in an old and cramped facility already used by another

congregation, preventing many of its planned ministries and religious activities. A lawsuit against the Village is pending. See *Vision Church, United Methodist* v. *Village of Long Grove*, No. 03 C 5761 (N.E. Ill. 2003).

B. The Seventh Circuit's Standard Sets the Threshold for Finding a Substantial Burden So High that the Protections of the Free Exercise Clause and RLUIPA Are Often Rendered Meaningless.

In response to these types of problems, Congress unanimously passed and President Clinton signed RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA protects religious land use from discriminatory and arbitrary treatment by subjecting discretionary land use decisions that substantially burden the exercise of religion to strict scrutiny. See *id.* RLUIPA also requires that its provisions be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g).

RLUIPA's substantial burden test was primarily intended to weed out tenuous claims based on minor or incidental burdens that are inherent in any land use system, while still preserving a remedy for claims involving actual religious hardship. Although RLUIPA defines religious exercise to include the construction or use of a house of worship, *id.* § 2000cc-5(7), it does not specify what qualifies as a "substantial burden" on the exercise of religion. Nevertheless, Congress clearly intended that term to be interpreted in accordance with this Court's past decisions. See 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000).

The substantial burden test has a significant pedigree in this Court's free exercise jurisprudence and in other decisions applying the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. As explained in greater

detail below, this Court has always defined substantial burden to include cases of bona fide religious hardship – where state action makes religious exercise significantly more difficult. (See *infra*, Section II.C.) To be sure, the precise rubric for determining substantial burden has varied in this Court's decisions. But this Court has never conditioned judicial review under the Free Exercise Clause on the state barring a religious practice or making it effectively impossible, and it is clear that Congress did not intend to adopt so high a standard when it passed RLUIPA.

Nevertheless, the Seventh Circuit has established an extremely exacting substantial burden standard. The decision below, by reference (see Pet App. 13a n.5) to the Seventh Circuit's previous decision in *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3644 (June 7, 2004) ("*CLUB*"), requires that the challenged land use regulation "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." *Id.* at 761. Indeed, the Seventh Circuit's standard is so difficult for churches to satisfy that it renders federal protections for religious land uses almost meaningless, leaving churches defenseless in the face of the very arbitrariness and discrimination Congress intended RLUIPA to remedy. Unfortunately, the Seventh Circuit's approach to substantial burden – articulated in *CLUB* and applied below – has been adopted by a number of courts already[6] and is now routinely advanced by land use regulators seeking to avoid RLUIPA's protections.

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[6] *See San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (stating its "substantial burden" test was "consistent with" the Seventh Circuit's test); *Konikov* v. *Orange County, Fla.*, 302 F.Supp.2d 1328, 1344-45 (M.D. Fla. 2004); *City of West Linn*, 86 P.3d at 1152-53, 1157.

For example, the Seventh Circuit's standard would preclude a RLUIPA claim against a municipality that arbitrarily mandated a large reduction in the size of a proposed chapel. Even if the proposed structure were fully compliant with objective zoning standards and even if the reduction significantly inhibited religious exercise, the bare fact that parishioners could still worship in a smaller chapel would preclude any judicial review whatsoever under the Free Exercise Clause or RLUIPA. Moreover, no matter how great the religious hardship and how arbitrary the reasons, under the Seventh Circuit's standard the municipality could simply deny the application altogether as long as it left open at least one other place to build "within the regulated jurisdiction." *CLUB*, 342 F.3d at 761. RLUIPA would not even be triggered.

The decision below reduces RLUIPA's powerful safeguards against arbitrary land use regulations into an easily satisfied technicality that regulators not make a religious practice effectively impossible within an entire jurisdiction. This approach vitiates essential protections for religious land use and will result in the abridgment of basic religious freedoms. In fact, that is already occurring even outside the Seventh Circuit as courts adopt its standard. For instance, as described above, the Court of Appeals of Oregon ultimately rejected the LDS Church's RLUIPA claim based on the Seventh Circuit's approach. The court held that because church members had not yet been turned away at the overcrowded meetinghouse in the neighboring town, and because the city had not foreclosed another application for a differently configured building, the church's religious exercise was not substantially burdened. *City of West Linn*, 86 P.3d at 1156-57 (relying on *CLUB*).

This Court's review is necessary to address an issue of fundamental importance to religious organizations across the nation.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE INTOLERABLE CONFUSION AND CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF "SUBSTANTIAL BURDEN" UNDER THE FREE EXERCISE CLAUSE AND RLUIPA.

A. The Lower Courts Are Deeply Conflicted Over What Constitutes a "Substantial Burden," with Courts Generally Divided Between High- and Medium-Threshold Standards.

To make matters worse, widespread confusion exists in the lower courts as to what constitutes a substantial burden on religious exercise, with standards and formulations varying greatly from case to case. Numerous lower courts have noted the confusion in their attempt to define the proper standard. See, *e.g.*, *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 507 (1997); *Hicks* v. *Garner*, 69 F.3d 22, 26 (5th Cir. 1995) (reviewing different approaches of the circuit courts).[7] Generally, the lower courts are divided between high-threshold and moderate-threshold standards for satisfying the substantial burden requirement.

On the high-threshold side, the Seventh Circuit has held that a regulation must "direct[ly], primar[ily], and fundamental[ly]" render religious exercise "effectively impracticable" anywhere in "the regulated jurisdiction generally." *CLUB*, 342 F.3d at 761. As explained, this is an exceptionally difficult standard to satisfy in the land use context. The Ninth Circuit has adopted a "significantly great restriction or onus" test, which the court has applied "consistent with" the Seventh Circuit's test. *San Jose*

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[7] *See also, e.g., Guru Nanak Sikh Soc. of Yuba City* v. *County of Sutter*, 326 F.Supp.2d at 1152 ("It is easy to identify these general principles [regarding substantial burden], as explained by the appellate courts; it is far more difficult to discern what they mean in the real world or apply them to real facts.").

Christian Coll. v. *City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). The Second Circuit takes a slightly different tack, holding that a law substantially burdens religious exercise only when it "denies" or "drastically restrict[s]" the "ability" to exercise religion. *Rector, Warden & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990). And despite this Court's repeated teaching in cases like *Employment Division* v. *Smith*, 494 U.S. 872, 886-87 (1990), and *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988), that courts cannot weigh the significance of particular religious practices, the D.C. Circuit continues to analyze "the importance of a religious practice when assessing whether a substantial burden exists." *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir.) (analyzing whether the burden impacts a "'central religious belief or practice'"), *reh'g denied*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (reasserting appropriateness of "importance" analysis under RFRA/RLUIPA).

On the moderate-threshold side, the Fifth, Tenth and Eleventh Circuits and the Washington Supreme Court employ much more lenient tests. Consistent with this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707, 717-18 (1981), these courts hold that a substantial burden is "pressure" that "*tends*" (*Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.), *petition for cert. pending* 73 U.S.L.W. 3238 (Oct. 1, 2004) (No. 04-469)) or has a "'*tendency*'" (*Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (citation omitted and emphasis added)) to force adherents to forego religious precepts or act contrary to religious beliefs. Instead of having to prove a drastic restriction or near impossibility, it is enough that government "significantly inhibit or constrain," "meaningfully curtail," or deny "reasonable opportunities" for religious exercise (*Thiry*, 78 F.3d at 1495 (internal quotation omitted)); or that it make religious assemblies "relatively inaccessible within the city

limits" (*Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988)); or even that it impose a "*financial* burden on religious activity," for example, "grossly diminish[ing] the value of the church's principal asset." *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992) (emphasis added).

Of particular note, the circuit conflict was significantly sharpened by the Eleventh Circuit's recent decision in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214. The Eleventh Circuit expressly rejected the Seventh Circuit's high-threshold standard for substantial burden on the ground that it is inconsistent with RLUIPA's plain wording: "[W]e decline to adopt the Seventh Circuit's definition" of substantial burden because it "would render [RLUIPA] § b(3)'s total exclusion prohibition meaningless." *Id.* at 1227.[8] Instead, the Eleventh Circuit adopted a moderate-threshold test consistent with this Court's teachings: "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.*

B. In the Religious Land Use Context, Conflicting Substantial Burden Standards Produce Different Substantive Results Even Under Closely Analogous Facts.

Because the outcome of the substantial burden analysis often determines whether a land use decision is subject to

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[8] RLUIPA's exclusion provision, 42 U.S.C. § 2000cc(b)(3), provides: "No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

judicial scrutiny under the free exercise clause or RLUIPA, conflicting standards inevitably produce conflicting substantive results in an area of the law that is vital to religious organizations. For instance, the Seventh Circuit below held there was no substantial burden as long as churches could locate somewhere else in Chicago, even if the alternative facility was inconvenient or inadequate. In contrast, the Fifth Circuit in *Islamic Center of Mississippi*, 840 F.2d at 299, employing a moderate-threshold test, held that making religious assemblies even "relatively inaccessible within the city limits" created an "obvious[] burden [on] the exercise of religion."[9]

In practice, which test a court uses to assess substantial burden usually predetermines the outcome. It is noteworthy that *no* court applying the high-threshold test has ever found a substantial burden in the land use context, whereas courts applying the moderate-threshold test may or may not find substantial burden depending on the facts. See *Midrash Sephardi*, 366 F.3d 1228, (no substantial burden); *Thiry*, 78

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[9] Similarly, several district courts applying the moderate approach have found a substantial burden under RLUIPA even though churches operated *existing* facilities. *See Williams Island Synagogue, Inc.* v. *City of Aventura*, ___ F.Supp.2d ___, 2004 WL 1059798, *4 (S.D. Fla. May 6, 2004) (holding that denying a variance "to accommodate the needs of an expanding congregation" was a "substantial burden" because the existing facility "had become inadequate" and the denial "prevent[ed] the congregation from fully practicing the tenets of its beliefs"); *Castle Hills First Baptist Church* v. *City of Castle Hills*, ___ F.Supp.2d ___, 2004 WL 546792, at *9 (W.D. Tex. Mar. 17, 2004) (finding substantial burden in city's denial of permit to use an unoccupied fourth floor of church building for Sunday school); *Cottonwood Christian Center* v. *Cypress Redev. Agency*, 218 F.Supp.2d 1203, 122-27 (C.D. Cal. 2002) (finding substantial burden in denial of permit to build a larger worship site because applicant, which already operated a smaller facility, showed "a religious need to have a large and multi-faceted church"); *Murphy* v. *Town of New Milford*, 289 F. Supp. 2d 87, 113 & n.29 (D. Conn. 2003) (holding that an order capping those who could gather for home-based prayer meetings constituted a substantial burden).

F.3d at 1495-96 (same); *Islamic Ctr.*, 840 F.2d 298-99 (finding undue burden); *First Covenant*, 840 P.2d at 183-84 (finding impermissible burden).

The difference lies in the nature of the inquiry. Because the high-threshold standard probes only for outright preclusion, near impossibility, or some other drastic restriction, a simple showing of a theoretically alternative land use site (an actual, suitable alternative site is almost never available or the church would not be litigating) will generally end the analysis. Once that is found, the burden and inconvenience to the church are deemed virtually irrelevant. On the other hand, the moderate-threshold standard requires a more nuanced, fact-intensive analysis to determine whether the regulation actually imposes a bona fide religious hardship on the claimant, *i.e.*, whether it meaningfully curtails or makes significantly more costly religious exercise. When the test severely constricts the facts a trial court may consider in this initial inquiry – as in the Seventh Circuit's high-threshold test – religious land users have little if any chance of prevailing under RLUIPA.

In short, the doctrinal and theoretical conflicts set forth above and in the petition result in starkly conflicting outcomes in religious land use cases. Under the standard established by the Seventh Circuit in *CLUB* and applied below, a church's RLUIPA claim will nearly always fail even when a religious hardship is the result of an arbitrary regulation. However, in the Fifth, Tenth, and Eleventh circuits and in the State of Washington, under identical facts, a church's showing of religious hardship will result in a successful RLUIPA claim. This intolerable conflict, which must ultimately be resolved by this Court, will only grow as ever more RLUIPA cases wend their way through the federal and state courts. This Court's review is richly warranted.

C. The High Threshold Established by the Seventh Circuit Conflicts in Principle with this Court's Prior Decisions and Teachings Concerning Substantial Burden.

Lastly, this Court's prior free exercise decisions have not required that religious exercise be precluded or rendered practically impossible but rather (as noted above) that government action create a non-trivial religious hardship. As explained in the petition, the Seventh Circuit's creation of such an onerous substantial burden test creates fundamental tension with this Court's free exercise decisions.

Indeed, the Seventh Circuit's test is flatly contrary to the key assumptions underlying this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872, 885 (1990). In *Smith*, this Court described the substantial burden requirement as merely one of "religious hardship," a formulation it later reaffirmed in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 537 (1993) (strict scrutiny applies when a regime of "individualized exemptions" is not extended "to cases of 'religious hardship'"). This Court's moderate-threshold test for substantial burden was central to the holding in *Smith*. *Smith* was based on this Court's view that, because the substantial burden test is relatively easy to satisfy, neutral laws of general application must be evaluated under a more deferential test than strict scrutiny, lest the federal courts continuously be placed in the untenable position of dispensing religious-based exemptions to innumerable general laws. *Smith*, 494 U.S. at 885. In other words, it was precisely because of the moderate threshold of the substantial burden standard that this Court was reluctant to open up all neutral and generally applicable laws to strict scrutiny review.

Where strict scrutiny continues to apply, however – such as where laws require individualized assessments – these concerns are not implicated. In those contexts, it makes no sense for the substantial burden test to be as strict as the

Seventh Circuit's approach. In fact, the standard articulated below would turn *Smith* on its head. It makes the substantial burden requirement so onerous that even those regulations that *Smith* recognizes as subject to the substantial burden/strict scrutiny standard would be effectively immune from challenge in all but the most extreme cases.

The Seventh Circuit's approach conflicts with the most basic assumptions of this Court's modern free exercise decisions. This Court should grant review to resolve this important doctrinal conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

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American Jewish Congress is an organization of American Jews founded in 1918 to protect the religious, political, civil, and economic rights of American Jews. It has taken a special interest in religious liberty issues. Its legal staff played a significant role in drafting RLUIPA.

Baptist General Conference ("BGC") is an association of 1,015 Baptist churches located throughout the United States. Many of BGC's affiliated churches are new, and many others are growing. As BGC churches have sought zoning approval for new property acquisition or the expansion of existing church sites, they have received varying responses from local governments. BGC would welcome this Court's clarification of the rights of churches under the Free Exercise Clause of the First Amendment and RLUIPA.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over twelve million members worldwide. Due to rapid growth, the Church has an active program for constructing temples and chapels. In the course of its building program, the Church frequently encounters the types of land use problems at issue in this case. Although many local officials work with the Church in good faith to address legitimate land use concerns, the Church often confronts arbitrary or discriminatory land use decisions. In the Church's experience, a proper interpretation of RLUIPA's substantial burden test is essential to ensure that land use regulations are administered consistent with genuine respect for religious liberty. Moreover, the Church provided testimony to Congress during hearings which led to the enactment of RLUIPA. It has an interest in courts interpreting RLUIPA in a manner that comports with congressional intent.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 54,000 congregations with more

than 13 million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,600 congregations in the United States with more than 918,000 members. As a growing denomination in a multitude of political jurisdictions each with its own zoning laws and ordinances, the Seventh-day Adventist Church would welcome Supreme Court clarification of the church's rights under RLUIPA and the federal Constitution.

General Council on Finance and Administration of the United Methodist Church ("GCFA") is a national agency of The United Methodist Church that supports local churches with financial and property administration issues. GCFA is regularly called on by local United Methodist churches for advice and assistance in situations where local governments are blocking improvements or construction of United Methodist churches for reasons which appear to be an unreasonable burden on their right and ability to congregate and practice their religion. GCFA has found that these burdens are often supported by pretextual decisions concerning land use or traffic patterns. It believes this case could substantially affect the power of local governments to limit the right of United Methodists to practice their religion in the communities where they live.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the First Amendment. The

200th General Assembly of the Presbyterian Church (U.S.A.) expressly addressed these issues:

1. Churches have a right of autonomy protected by the Free Exercise clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention.

2. The government must assert a compelling interest and demonstrate an imminent threat to public safety before the right of autonomy may be set aside (and create a substantial burden) in specific instances and government is permitted to interfere with internal church activities.

Presbyterian Church (U.S.A.), *God Alone Is Lord of the Conscience*, A Policy Statement Adopted by the General Assembly 42-43 (1988). The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

Foundation for the Preservation of the Mahayana Tradition ("FPMT") is an international network of Tibetan Buddhist organizations in the Gelugpa tradition. A central entity that coordinates certain activities of FPMT's many affiliates in the USA and abroad is Foundation for the Preservation of the Mahayana Tradition, Inc., the Spiritual Director of which is Lama Thubten Zopa Rinpoche. There are at present approximately 130 centers worldwide affiliated with FPMT, thirteen of which are in the United States and which include centers for Buddhist studies, retreat centers, monasteries and nunneries, hospices, elementary schools, and more. FPMT owns property in various locations in the United States. Participating in Buddhist ceremonies, services, meditation retreats, and other religious events, which take place in retreat

centers, meditation cabins, temples, and other buildings of religious importance on these properties, is central to Buddhist practices. However, FPMT has struggled with local government officials over building permits to develop needed buildings on its properties. Thus, FPMT has a strong interest in the preservation and strengthening of the protections intended under RLUIPA, including clarity on the application of the "substantial burden" test.

International Church of the Foursquare Gospel ("ICFG") was established in 1927 to propagate and disseminate the principles of Christianity embraced in the Foursquare Gospel. As a hierarchical church, the ICFG operates Foresquare Gospel churches in the United States, and around the world. As of the year 2003, there were 1,888 Foursquare churches in the 50 states of the U.S. having 235,852 members and 4,879 credentialed ministers. There are over 5 million adherents worldwide attending some 32,000 Foursquare churches. In the operations of its many churches, ICFG is a landowner and builder of church-related structures in many communities across the country. In many additional communities, ICFG is a tenant user of properties owned by others. In both capacities, ICFG has been subject to and complied with local land use laws, zoning laws, and building and safety codes, though with increasing difficulty. Unfortunately, ICFG's experience has been that such laws are not infrequently administered in a manner which, in its view, reflects a bias against religious organizations and their activities. As a U.S. based church comprised largely of American citizen congregants, ICFG is increasingly concerned about the erosion of religious liberty that it perceives. With the passage of RLIUPA, ICFG was cautiously optimistic that the erosion of religious liberty with respect to property rights had been stemmed. However, recent interpretations and applications of RLIUPA by some courts have seriously compromised the protections ICFG believes the Congress intended to provide by RLIUPA. The questions presented in this case put the

issue squarely to the fore. ICFG's concern and its perceived duty as citizens prompt its interest and involvement in this brief.

The Northern Illinois Conference of the United Methodist Church ("Conference") is an assemblage of over 400 local United Methodist churches serving Chicago and numerous other urban and rural communities in Northern Illinois. It is one of 63 so-called "Annual Conferences" of the Denomination in the United States, and under the Church's ecclesiastical law, is thereby a "basic" organizational unit of the Faith. The Conference and its presiding Bishop have found it necessary to respond to a growing number of municipal efforts, in the guise of land use regulation, to arbitrarily suppress religious exercise by local congregations, including their ability to locate and build new houses of worship. Thus, it currently a party to RLUIPA-based litigations, and has a keen interest in the proper interpretation of that important Act, here in the 7th Circuit and elsewhere.

Worldwide Church of God began in the early 1930's in Eugene, Oregon. In 1947, it was incorporated in California, where it maintains its worldwide headquarters. The Church has congregations throughout the United States and affiliate churches in many foreign countries. The Church owns property at its headquarters site and in other parts of the United States. The Church has encountered in the past, and anticipates encountering in the future, conflicts with governmental officials over building codes and regulations, zoning, and related issues. The Church has a poignant interest in the preservation of RLUIPA in order to have a vehicle by which it can adjudicate arbitrary and capricious governmental conduct regarding the use of its properties.